

November 2016

## Examining the Civil-Military Divide Through New (Institutional) Lenses: The Influence of the Supreme Court

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EXAMINING THE CIVIL-MILITARY DIVIDE  
THROUGH NEW (INSTITUTIONAL) LENSES:  
THE INFLUENCE OF THE SUPREME COURT

A Dissertation Presented

by

ALLEN E. LINKEN

Submitted to the Graduate School of the  
University of Massachusetts Amherst in partial fulfillment  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

September 2016

Political Science

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ALLEN E. LINKEN

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Political Science

## DEDICATION

To my wife, Lauren,  
whose love, patience, and support  
are treasures beyond measure

## ACKNOWLEDGEMENTS

It would not have been possible to write this dissertation without the help and support of the many wonderful people that I am so fortunate to have in my life. I am forever grateful to each of you for your love and encouragement.

I am immensely appreciative for my mentor and friend, John Brigham, for offering space to think about law in new and dynamic perspectives while encouraging me to accept and draw strength from the practical experience of my time with the active duty military. This project began by merging my two professional ventures – the military and the law – but the realization that such a merger would strengthen, and not diminish either one of these, independent of the other, would not have occurred, but for the encouragement of John. I also owe special gratitude to Jane Fountain, both in her role of providing thoughtful support for this dissertation, but also for her ability to transform an institution into a living being, allowing it to be seen as a function of how it interacts with the world, and how it is interacted with. I am also thankful for Jen Lundquist. Her sociological examination of the American military helped me shape my questions, and her willingness to support me was very much appreciated. As a committee, I am thankful for their wisdom and advice in helping to shape and define this project, both in terms of scope and substance. Finally, I owe thanks to Sarah Marusek, for her thoughts and advice, which helped me refine the arguments of this work.

I am immensely appreciative of my dissertation committee, but I have been mentored and challenged by a great number of remarkable faculty at the University of Massachusetts. When I began to think about my question, and refine my thoughts, I knew that I could go to Daniel Burland. His wealth of experience provided both a

wonderful bond and background for his sage advice. I am specifically thankful to him for helping to refine my understanding of the relationship between chivalry and the military. I am equally indebted to Paul Collins, who generously provided thoughtful advice and suggestions when it was most needed, and especially so concerning measures of examining ideological assimilation. Brian Schaffner and Bruce Desmarais provided immense challenges through their respective courses, which I am also thankful for. Their expectations were high, but they were unfailingly supportive and helpful, many times showing me patience that I likely didn't deserve. Much of who I consider myself to be as a scholar comes from understanding law through multiple lenses, and I owe a great debt to Daniel LaChance and Alan Gaitenby. Daniel afforded me opportunities to think and to teach, and both he and Alan had open doors that I often passed through, and warm hearts to both chat, and provide thoughtful, candid advice. I am additionally thankful to Sheldon Goldman for his generosity in thought and spirit, and for his friendship. Many thanks are owed to Trish Bachand, Barbara Ciesluk, Donna Dove, Michelle Goncalves, Stephen Marvell, Lori Sadler, and Jennie Southgate for their support.

A warm note of thanks is owed to Anne Hildreth. Her support and kindness towards each and every one of her students is something that I aspire to achieve with my students.

The source of so many fond memories at UMass were from my peers, who became my colleagues, and most prized of all, friends. These smart, driven, kind people provided much sanity, advice, and mentorship, and my experience would not be the same without them. I am thankful for the friendship of Jim Aaron, Katie Boom, Ivelisse Cuevas-Molina, Alyssa Maraj Grahame, James Heilman, Kaylee Johnson, Mike Kowal,

Ardeshir Pezeshk, Micah Mintz, Harita Patel, and Ana Maria Ospina Pedraza. I owe deep gratitude to Wouter Van Erve and Melinda Rae Tarsi, who are both friends in the truest sense. Wouter has been, and continues to be, a source of encouragement and wisdom, who I can (and have) called at all hours of the day and night to work on projects or for advice. Melinda, from the moment that I arrived in the program, provided friendly advice and support, but she also had the warmest spirit. While she has undoubtedly provided me more support than I have her, I am honored to call her a friend, and I am grateful to her for so many moments.

I owe a special debt of gratitude to two people in my life who provided advice and support on how to be a better lawyer, and a better person. I had the privilege of working for Clyde Haig, LCDR, USN, Retired, and Charles Gibson, CAPT, USN, Retired, and I take lessons from those jobs with me everywhere that I go.

I am also appreciative of my family, who have always loved and supported me, encouraging me to strive for greatness in all that I do.



## ABSTRACT

### EXAMINING THE CIVIL-MILITARY DIVIDE THROUGH NEW (INSTITUTIONAL) LENSES: THE INFLUENCE OF THE SUPREME COURT

SEPTEMBER 2016

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Civil-military relations have existed for as long as there has been a military, but only in the last sixty years has research in the field began to examine the relationships between civilian elites and the military. Who controls the military? What level of influence by the military is acceptable in a liberal society, such as the United States? What is the appropriate role of the military? Who serves in the military? What pattern of civil-military relations best ensures the effectiveness of the military instrument?

The study of these questions began with examining relationships between the military and the President, and moved to examine, in turn, the relationships between the military and Congress, and then, the military and both the President and Congress, ascertaining that there is a gap, and that it is widening. But, what role does the Judiciary serve in better understanding the relationship between the military and civilian elites? The military is examined through the Judiciary, and more specifically the Supreme Court, to answer this question.

This work argues that the Supreme Court, as a rational actor and co-equal branch of government to both the President and the Legislature, is very much involved with the military, and that it has served to reinforce the widening gap found in earlier work. Every Supreme Court case that discusses the military, since the beginning of the All-Volunteer Force in 1973, is examined, and after selecting applicable cases, each case is examined both for what it said, and how it said it. Deferential doctrine that the Court uses when dealing with military cases is deeply analyzed, including discrepancies in majority sizes of military-related Supreme Court cases as against other cases, and that the Court engenders not one, but four separate civil-military gaps. Leveraging new institutionalism and bureaucratic autonomy, this work argues that the military, through its divergent institutions of authority, power, law, and morality, causes the Supreme Court to defer to the military, abdicating their own established standards, serving as both a catalyst to a widening gap, but also as an enabling factor to permit other branches to act similarly.

**KEYWORDS:** civil-military relations, military deference doctrine, Supreme Court

## PREFACE

There is a certain importance of knowing where someone has been, as it informs a reflection of their perspective. Similarly, it is important to recognize both the epistemological bases and the assumptions which underpin the question, and therefore, the research. This project carries a deep significance for me, personally, because it involves two of my professional loves – the law and the military. Law has, for as long as I can remember, been the focus of my life. After earning my Juris Doctorate and practicing for a number of years, I am a reformed lawyer, not only looking at law from a legal perspective, but also from a social science perspective. The other professional focus in my life has been the military. Immediately after law school, I began service in the military, serving as a lawyer. That career has taken me – and continues to take me – to a number of interesting and challenging jobs across the globe.

Taken together, these foci offer me a unique ability to critically examine my questions. Certainly one of the challenges in thinking about the military begins with its lexicon and verbiage. I will endeavor to present information concerning the military or the law in an accessible, but effective means. Another challenge that typically results from even a cursory examination of any large organization is the organizational processes. When those processes need to be explained, whether they be from military institution to the servicemember, or the institution to its civilian overseers, or the institution to the Court, I will lay out the processes that may not be well-known, if any, if their understanding would affect the described interaction.

I have written this work for a number of reasons. Not least among them is because it is an opportunity to open a dialogue between the language of the military and

the language of civilians; a means for one to understand the other. While the understanding of concepts can facilitate this, a goal of mine in the dissertation is to shed light on the culture. Through the examples provided in the cases that were studied, I believe that a greater understanding of the military institution and its actors can be obtained. This certainly could be an end in and of itself, but I view it as a means to improve a discourse which, in my view, is inhibited by a number of factors.

While in the active-duty military, I was introduced, and eventually immersed, in a different culture than what I knew, but it quickly became familiar. Aphorisms such as “Early is on-time, and on-time is late,” and “two is one; and one is none” describe a sense of preparation that is difficult to parallel outside of that environment. The belief that tardiness supplants what would previously be known as promptness or that an individual or group is only prepared when there exist multiples of an item, should the primary resource fail. Equally, a new vernacular found its way into my everyday conversation. Sentences such as “Where is the head?,” or “The geedunk is down this p-way, and it is the 3<sup>rd</sup> hatch down on the starboard side.” became commonplace ways to ask where a restroom could be found or where a snack machine could be found (down the hallway, 3<sup>rd</sup> door on the right). This new language also has linguistic shortcuts in the form of acronyms. Within what should be construed as a relatively narrow scope of examining one’s physical fitness, a servicemember should get in shape for the PFT, eat right to pass the BCA, and ensure that before the day of the test that they submit the proper documentation in PRIMIS.

A robust and growing body of literature speaks to a civil-military gap, a defined space in, *inter alia*, the language, cultures, and discourse. The brief examples of trying to

navigate to a snack machine or to prepare for a physical examination evidence the gap in discourse and language. However, the most difficult one to understand is the difference in culture. It is here that I believe a significant portion of this work attempts to shed light on this. By the large majority of accounts, this gap is widening, and this work is, at the very least, an attempt to understand that gap.

As a final thought, due to my working in the military, I wish to curtail any conception of implicit or explicit approval from that source. The Department of Defense does not endorse this work. No funding was received from the Department of Defense in support of this research.

## ANNOTATED TABLE OF CONTENTS

Overview: This dissertation is organized into two parts. The first part introduces and discusses basic concepts concerning civil-military relations, and providing a framework and examples of why the military is different, and setting the methodology of examination for the research. The second part sets about applying that methodology to the literature of cases, attempting to strengthen and broaden the body of knowledge of civil-military relations, and begin to understand the institution of the military through the Supreme Court.

### Part I – Concepts

#### Chapter 1 – Introduction

The first chapter introduces civil-military relations, first as a concept, and then as a field of study. The evolution of the field begins with understanding the role of the military and the civilian leadership of it. Beginning with the President, and moving to Congress, and eventually, both, the field attempts to understand the military's relations with each. Additionally, the first chapter introduces, and begins to leverage, new institutionalism as a means to understand civil-military relations.

#### Chapter 2 – Ethnography and Theory Examined

Using examples and anchoring the theory in notions of authority examined by Max Weber, this chapter examines the daily life of the Soldier, and how it directly interacts with concepts of legality and morality that can be – and usually are – different from notions of legality and morality in civilian life. Moreover, and at the heart of the question asked by this book, this chapter examines what happens when civilian and military structures meet, and specifically discusses the unique treatment of the military by the Supreme Court.

#### Chapter 3 – Research Methodology

The third chapter asks the initial question of the research – whether the Supreme Court is involved with the military at all, and then sets forth the methodology of study. As one of the first works to examine the military through the lens of the Court, the question of whether the Court is even involved with the military is not settled. Attempting to answer that question, on at least a *prima facie* level, I then lay out the methodology in identifying and selecting cases, and prioritizing them for the study.

### Part II – Application and Study

#### Chapter 4 – Quantitative Examination

In this chapter, the data is quantitatively examined to begin the analysis of whether the Supreme Court treats the military differently than all other cases. Using standardized

data, and a variety of means, the data is descriptively and substantively attempt to answer whether the military is, in fact, different.

#### Chapter 5 – The Four Civil-Military Gaps

In this chapter, the civil-military gap is redefined, analyzing it as not one civil-military gap, but four. Cultural, demographic, policy-preference, and institutional differences between civilians and the military will be defined, and those gaps are examined through Supreme Court cases.

#### Chapter 6 – What Comprises a Doctrine?: An Analysis by Gap, Ideology, and Influence

Here, the body of cases that appeared before the Supreme Court, and were subsequently decided by them, were analyzed on a gap-by-gap basis and also examined to try and ascertain the reasons why such gaps exist. What extralegal factors might influence broad deference to the governmental/military position, and how are those factor, policies, and decisions trending in the past forty years?

#### Chapter 7 – Conclusion

In this chapter, the previous chapters are analyzed as a whole, noting the findings of the work, and offering insight to recent happenings at the Supreme Court relative to the military.

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## PART I

In this first part, this work will be introduced generally, but also to frame why the question of how the military's interaction with the Supreme Court, and vice versa, is important to the study of civil-military relations, and how it may be leveraged to better understand this field of study, and the widely accepted gap that is forming between the military mindset and that of the civilian community.

Chapter 1 begins by stating what the civil-military gap is, why it matters, and what has been leveraged to understand it. Who has examined this problem? What has been done to define and explain it? *How have we traditionally understood it?* This question is emphasized because at the core of this work are fundamentally different ways of thinking about the problem of the civil-military gap and the examination of civil-military relations.

Through the institution of law, and specifically through the Supreme Court, I seek to provide a deeper understanding of civil-military relations, which has traditionally been studied and placed in context with the Executive and the Legislature, but not the Judiciary. Law is omnipresent, but sometimes not very visible. In these first chapters, not only will the omnipresence of law as it abuts and weaves into the very values and core of the military be examined, but also its prominence; its visibility. How is it seen? How is it known? To that end, a case-study is offered to provide context, and also to extend the theory of this work. By examining notions of power and authority as woven into law and the military, the intent is to highlight that prominence, and evidence why this project and its theoretical underpinnings can deepen the understanding of civil-military relations.

Concerning this project, the last chapter in Part One examines the methodology of this project. Utilizing legal search services, criteria for the study are identified, which provide data for examination, and just as important, provide definite lines to inform which cases are not included. Through this process of the creation of criteria, and selection of cases, the methodological framework of the study is articulated, which permits confidence in subsequent results.

## CHAPTER 1

### INTRODUCTION

Since the inception of the military in the United States, there has been civil-military relations, that is, simply put, the relationship between civil society as a whole and the military.

Whether in the form of President Washington negotiating with Congress for the supply of the Continental Army in 1775, or John Adams dealing with the politics of rearmament in 1798, or the power struggle between the Secretary of War under President Theodore Roosevelt and the then-serving Commanding General of the Army, or the 2006 revolt of the Generals against the then-Secretary of Defense Rumsfeld, there has been an ongoing relationship between the military and its civilian leadership. As each of these institutions have grown and evolved, there have certainly been ebbs and flows in, for example, how fiscal requirements are negotiated, or how policy is carried out, and the relationship between them changes constantly. The relationship theoretically gets closer as those with military backgrounds are elected President (most notably, President Bush, who earned the Distinguished Flying Cross in World War II, and President Eisenhower, who served as Supreme Allied Commander in Europe from 1942-1945, though with the exception of President Obama, every President since President Truman has had some active service), but does the relationship actually get closer, and what does that mean? And, on occasion, the relationship theoretically grows further apart, such as when the divergent interests of the military are self-realized and when those interests are levied against either Congress or the President.



Finally, is this good, or desirable? Only recently, however, given the broad spectrum of these interactions and relationships, has the field of civil-military relations been studied.

Scholarship in the field of civil-military relations has been prolific, starting from post-Korean War seminal attempts to understand what created a gap between society and the military as an institution (Huntington 1957; Janowitz 1960). These initial, and very influential theories evolved during the Cold War and began to examine internal and external threats (Desch 1999), to the institutional (military) response to changing circumstances (Avant 1994), to the notion of institutional transmutation following conflict to better comport with liberal society notions of the military (Langston 2003). Following the scholarship of internal and external threats, Feaver examined the civil-military gap through the lens of agency theory, arguing that the major question is how closely the civilian overseers will monitor the military (1996). Following Feaver and the agency theory model that he proposed, the examination of civil-military relations moved toward a more institutional response, arguing that civil-military relations is not only the tension between the Executive branch of American government and the military, but that the struggle also includes the Legislature. Stevenson examines the problem of civil-military relations through a model that includes the President and his agents, Congress, and military leadership (Stevenson 2006). Related, concordance theory examines the civil-military gap through the lens of physical and ideological separation from political institutions of a state (Schiff 1995; Schiff 2009).

Each of these scholars leverage theory to better understand civil-military relations, but more specifically, a relationship that is growing apart. While there are

some who dispute that the civil-military gap is growing (Collins and Holsti 1999),<sup>1</sup> it is generally accepted that the ideological distance between civilian elites and the military is growing. One of the first large data attempts at understanding the breadth of the gap was done by Professor Holsti (Holsti 1999).<sup>2</sup> Beginning in 1976, and for every four years thereafter until 1996, a long-questionnaire survey was mailed to approximately 4,000 opinion leaders who had been drawn from sources that would yield military officers, media leaders, politicians, labor leaders, and foreign policy experts. Return rates on these surveys lends power to the results, as between 53% and 64% of those surveyed responded, including between 115 and 117 military officers in surveys between 1980 and 1996 and over 500 military officer respondents in 1976. From those surveys and the subsequent analysis of them, several themes emerged. First, partisan and ideological separation between civil and military leaders has widened substantially. Second, there is a gap in domestic and foreign policy issues, but it is not widening. Finally, because there are defined ideological differences between civilian and military elites, there may be “significant policy implications” (Holsti 1999: 8-9).

Paradoxically, civil military relations – that is, relations between the military and civilian elites in a burgeoning field where the the gap between the players is widening - bypasses an examination of how the Judiciary affects such relations. Is this bypass justified? Over the Court’s history, one might assume that it has dealt with issues about and concerning the military, but it is not clear how that works. There are famous cases like *Korematsu v. United States*, 323 U.S. 214 (1944), *Frontiero v. Richardson*, 411 U.S. 677 (1973), and, recently, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which all suggest a relationship, but what is it? Why has the study of the field largely skirted examination of

the Court? What are the consequences of this examination being absent? Is the Supreme Court an actor that has a causal relationship with other actors, or is it responsive to the actions of other actors?

Briefly stated, the sum of the literature appears to recognize the importance of institutions, but the literature itself appears to be moving in a direction where there is acceptance that the relations between the Executive, Legislature, and the military appear to affect the civil-military gap. Somewhat oddly, however, absent from the existing literature on civil-military relations is any substantial analysis of the role of the federal Judiciary. This is not meant to suggest that in no case has the military been examined through the Judiciary, however. The Supreme Court has long held that the military has a separate and distinct purpose from civilian society, and these differences were highlighted in contemporary pieces in law reviews (Lichtman 2006, O'Connor 2007). But, the concepts in these articles have not been substantively addressed in the context of the larger question of civil-military relations.

This work will interrogate the level of involvement that the Supreme Court has had, and continues to have, in civil-military relations. Because this question is broad, it needs to be broken down to help understand the role of the Court in this field. The approach will have three levels. First, it will be established that the Supreme Court is an actor in civil-military relations, and then inquire as to the depth of that involvement. Second, the Supreme Court – and its rulings – will be examined as to their role in being an exacerbating factor that causes or magnifies the civil-military gap that is currently being observed by mainstream scholars, or whether those same decisions and doctrines are an effect of a widening gap naturally caused by the decisions and actions of other

institutions. Third, the current state of the military will be studied through the lens of judicial decisions and actions, to determine the movement in the relationship between the military and the Supreme Court.

It is the hope that this project not only lands in what is a growing body of literature, but helps to develop a new branch of it. However, to understand where where this work is going, it is important to understand where the literature in the field has been.

### The Evolution of Civil-Military Relations Theories

Broadly construed, this work is premised on a change being evidenced in the relationship between the military and civilians. Defined as “interactions among the people of a state, the institutions of that state, and the military of that state,” (Owens 2012: 1), civil-military relations examines any number of questions. Professor Owens, a Professor of National Security Affairs at the United States Naval War College, stated these plainly articulated these complex questions as: Who controls the military? What level of influence by the military is acceptable in a liberal society such as the United States? What is the appropriate role of the military? What pattern of civil-military relations best ensures the effectiveness of the military instrument? Who serves in the military? (2011: 1, 2012: 1).

The answers to these questions are not static. Indeed, these answers are constantly changing, and the evolution of these answers provides a rich story that provides explanation and detail to the relationship of civilians to the military.

## The Evolution of Theory

To begin to see how this relationship may (and often does) change, it is first important to understand how the recognition and understanding of it has evolved. Just following the Korean War, Samuel Huntington, in *The Soldier and the State* (1957), seminally advanced the military history that varied from a chronological history (Coffman 1991: 1). While it is true that civilians and the military, since the inception of the military, interacted, Huntington wrestled with civilian control of the military in an attempt to understand those relationships, attempting to clarify and understand that interaction.

Huntington posited that three variables shaped American civil-military relations. Those variables were the external threat, which he named the functional imperative, the constitutional structure of the United States, and the ideology of a state, the latter two which Huntington named the societal imperative. Huntington identified four ideologies: conservative pro-military, fascist pro-military, Marxist antimilitary, and liberal antimilitary, with Huntington arguing that the dominant ideology in the United States was liberal anti-military. Arguing that the societal imperative did not change, Huntington concluded that the burden of explaining change in civilian control of military armament would have to have rested with the functional imperative, to wit: external threat (Owens 2011: 20-21).

Huntington attempted to find a solution to what Peter Feaver later termed the civil-military *problematique*; that is, “how to minimize the power of the military (and thus make civilian control more certain) without sacrificing protection against external enemies” (Owens 2011: 21).

Using his lexicon, he differentiated between objective and subjective civilian control. Objective control, according to Huntington, argued that the optimal means to assert control over the military was to professionalize them. According to Huntington, professionalization is a confluence of the practice of arms, evolution of concepts through wartime testing, and the ethos of the military mindset (Huntington 1957). Subjective civilian control, then, per Huntington, remains focused on professionalism, but is described as a reduction in professionalism due to co-opting by civilian political groups of the military.

From Huntington's examination of civil-military relations, Janowitz, in *The Professional Soldier*, used a methodology that included content analysis, a survey of 760 generals and admirals and 576 military officers from the Pentagon, and interviews of over 100 high-level officers (1960: 995). It revealed the changing nature of organizational authority within the military away from a disciplinary model towards subtler forms of personnel management, reflecting a convergence between the military and civilian spheres. Furthermore, the soldier had become more technical and proficient in its functional means, narrowing the gap between the civilian and military spheres by requiring specialized civilian participation in the more technical capacities of the military. The military also seemed to be experiencing a shift in recruitment trends, wherein the demographics of the military after World War II began to more closely resemble those of the American people. Finally, the leadership of the United States Armed Forces had become increasingly politicized (1960).

These initial, and very influential theories evolved during the Cold War and began to examine internal and external threats (Desch 1999) to institutional (military) response

to changing circumstances (Avant 1994) to the notion of institutional transmutation following conflict to better comport with liberal society notions of the military (Langston 2003).

Desch examined Lasswell (1941) and his argument that the in the future, the world of the garrison states will prevail. That is, there will be power given to the specialists of violence, and they will acquire skills of civilian management, rule autocratically, and equalize income for solidarity. Desch examined Cold War relations and found the opposite to be true. He found that civilian authorities have not been able to exert greater control over military policies and decision-making. In wartime, civil authorities cannot help but pay close attention to military matters. In times of peace, however, civilian leaders are *less* interested in military affairs—and therefore often surrender them to the military. This counterintuitive work posited the notion that instead of external threats causing the military to take the lead in civil-military relations, it is the absence of these external threats that gives the military authority. Alternatively, it is those external threats that give civilians the lead in the relationship between civilians and the military.

Avant continued to examine external threats and how civilians and the military respond to those threats. However, Avant's working theory examined political structure within the United States and Britain versus external stimuli. Drawing on the new institutional economics, Avant assumed that actors at every level will seek to enhance their political power. Moreover, Avant argued that military organizations will respond to civilian goals when military leaders expect rewards for their responsiveness. Tracing the evolution of civil-military relations in the United States and Britain, Avant concluded that

a nation's political structure has a major impact on the structure of military organizations and their formation of military doctrine.

Avant found that structural differences between the British and United States governments have resulted in very different biases within the two armies. Unified political institutions in Britain worked to create an army that was sensitive to civilian goals and enabled civilian leaders to intervene to force military change. Conversely, the United States political system tended to allow adherence to classic principles of military science within the Army and often impeded effective civilian intervention. These contrasting conditions contributed to the relative ease with which the British Army adapted to new peripheral threats and the reluctance with which the United States Army responded to change in Vietnam.

Where Avant leaves off with how structure affects civil-military relations, Langston picks up and argues that when wars end, there is inevitably a period of adjustment in which the relationship between civilian leaders and the military is realigned. Such realignments are never easy. After its wars, America has rarely faced a clear threat, whether foreign or domestic, that would help define what the relationship between political and military leaders should be. Without a clear threat, the interests of civilian and military elites diverge. Drawing on Samuel Huntington's theory, Langston contends that military elites in peacetime prefer to reform the military in preparation for future war, while civilians would rather tame the military, using it to serve their goals.

Langston's true contribution, however, lies in his argument that civil-military relations are not a zero-sum game – that is, both civilian institutions, and their respective players, and the military institution, and its respective players, can achieve gains without



doing so at the expense of the other players. Langston limited his examination to civilian leadership in the Executive branch, but the natural extension of this was made by later work.

More recently, Feaver examined the civil-military gap through the lens of agency theory, arguing that the major question is how closely the civilian overseers will monitor the military (Feaver 1996). Most recently, the examination has moved toward a more institutional response, arguing that civil-military relations not only include the tension between the Executive branch of American government and the military, but the struggle also includes the Legislature. Stevenson examined the problem of civil-military relations through a model that includes The President and his agents, Congress, and military leadership (Stevenson 2006). Related, concordance theory examines the civil-military gap through the lens of physical and ideological separation from political institutions of a state (Schiff 2009).

Stevenson examined Feaver's principal-agent model, and its failure to account for Congress, and attempted to understand civil-military relations through a lens that introduced the legislative branch. This, *ab initio*, is significant, as it signifies a formal shift to the new institutionalism which is currently accepted in the field. Stevenson stated that there is an ongoing struggle that exists within the military. On one hand, the military seeks autonomy and resources from its civilian counterparts, and on the other, the military's loyalty is sometimes torn between the civilian arm that it favors most, where that civilian arm struggles, as the author argues the Framers of the Constitution intended. The United States military is "cross-pressured by its two masters and [...] often feels compelled to turn to one for relief from the other." By examining several important

conflicts in American military history, Stevenson highlighted the importance of the Legislature in understanding civil-military relations.

From the nascence of new institutionalism as applied to civil-military relations, Schiff reaffirms such an application and extends that application into an attempt to understand how civilian institutions shape the military's self-understanding, in an attempt to determine the conditions under which the military will intervene in the domestic politics of the nation. Many scholars agree with the theory of objective civilian control of the military, which focuses on the separation of civil and military institutions (Huntington 1957). This view relies heavily on the United States case, from an institutional perspective, during the post-World War II period. Schiff provides an alternative theory, from both institutional and cultural perspectives, that explains the case of the United States as well as several non-United States civil-military relations case studies. Concordance theory does not preclude a separation between the civilian and military worlds; but it does not require such a condition to exist. Schiff argues that three partners – the military, political elites, and citizenry – should aim for agreement among four primary indicators: the social composition of the officer corps, the political decision-making process, the method of recruiting military personnel, and the style of the military. If agreement occurs among the three partners with respect to the four indicators, domestic military intervention is less likely to occur.

#### New Institutionalism to Explain the Field

Not expressly stated in the works by Feaver, Stevenson, Langston, and Schiff, but evident in their analyses, is the reliance on new institutionalism. That is, rather than

studying institutions separately from the world in which they exist, these authors examined those same institutions and how they are affected by, and how they affect, other institutions. One of the first works to study how institutions shape behavior was based off of Weber's work on causes of bureaucratization and rationalization. In this seminal work by DiMaggio and Powell, the authors attempted to understand what caused bureaucratization and asked not what made organizational fields different, as previous authors had done (Woodward 1980; Child and Kieser 1981), but what made them homogeneous (1983). Organizations, it was argued, once they are structured to be in the same field, have forces that are applied against and to them that lead them to be more similar to one another. Borrowing the term of "isomorphism," the authors argued that the concept that best encapsulates the process of homogenization is isomorphism, which was defined as a "constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions" (1983: 146). DiMaggio and Powell identify three mechanisms through which institutional isomorphic change occurs. Those mechanisms are coercive isomorphism, mimetic isomorphism, and normative isomorphism. Coercive isomorphism stems from political influence and the problem of legitimacy, mimetic isomorphism is caused by standard responses to uncertainty, and normative isomorphism is preceded by professionalization. Ultimately, through each mechanism, the institution through regulations, uncertainty, or professionalization responds by evidencing similar behavior across the actors in the organizational field, thusly evidencing behavior shaping conduct.

In the time since DiMaggio and Powell wrote their seminal article, new institutionalism has been studied through a number of methodological and sociological

lenses, developing subfields. Two of the most prominent are featured in the series of works that examine civil-military relations: rational choice institutionalism and historical institutionalism.

Bearing on this analysis, rational choice institutionalism is a theoretical approach to the study of institutions, which argues that actors use institutions to maximize their utility. However, actors face rule-based constraints provided by the institutional environment which influence their behavior. Rational choice institutionalism arose initially from the study of congressional behavior in the United States in the late 1970s. It employs analytical tools borrowed from neo-classical economics to explain how institutions are created, the behavior of political actors within it, and the outcome of strategic interaction.

Rational choice institutionalism explains the creation of institutions as an attempt to reduce transaction costs of collective activity, which would be significantly higher without such institutions. Institutions persist after their creation because they reduce uncertainty and allow gains from exchange. Rational choice institutionalism assumes that political actors within the institutional setting have a fixed set of preferences. To maximize those preferences, actors behave in a highly instrumental manner through systematic foresight and strategic cost-benefit calculation. Institutions lay down the “rules of the game,” define the range of available strategies and the sequence of alternatives. The actor’s behavior will be highly influenced by the expectation of how other players will bargain. The institutional environment provides information and enforcement mechanisms that reduce uncertainty for each actor about the corresponding behavior of others. This “calculus approach” explains how the institutional setting

influences individual behavior and stresses how strategic interaction determines policy outcomes.

Applying the principles of rational choice institutionalism, its influence is visible in the work by Feaver, Stevenson, Langston, and Schiff. Feaver most directly asserts the relationship of institutions by specifically introducing Congress as a separate institution that affects the relationship between the President and his agents and the military, and arguing, using agency theory, that the military aligns itself with the institution most favorable to it. However, this can be evidenced in the remainder of the pieces that are contemporary to Feaver. Stevenson concluded that the military, while accepting of both Congressional and Executive control, will, when the Congress and the President are in disagreement, side with the institution that most favors their position.

As the examination and study of civil-military relations implicitly and explicitly moves towards new institutionalism and the interaction of competing and cooperative institutions, an alternative theory evolved that can be leveraged to study civil-military relations, also based in institutional study.

### Bureaucratic Autonomy

Ackerman studied civil-military relations through a different institutional lens than his predecessors. He examined the ideological capture of civilian institutions by those with military experience, which closed the gap between civilians and the military, and thusly, reduces ideological control of civilians over the military. For Ackerman, such an ideological capture of civilian institutions, combined with the Weberian rationalization of the Office of the President of the United States will engender a coup of the inherent

values that are special to the United States. While many of the scenarios discussed by Ackerman are somewhat apocryphal, they do shed light on the increasing gap between the military and American society, and force us to examine what the dangers of that gap are (Ackerman 2010).

Ackerman's work most closely fits in with literature on bureaucratic autonomy and institutional entrepreneurship. Bureaucratic autonomy "occurs when bureaucrats take actions consistent with their own wishes, actions to which politicians and organized interests defer even though they would prefer that other actions (or no actions at all) be taken" (Carpenter 2001:4). To that end, it is hypothesized that it is in the interest of civilian officials to control the military to the degree that a coup does not occur. This interest is hypothesized by Feaver (using agency theory to examine whether the agent [the military] is shirking or working and that patterns emerge depending on whether the civilians monitor intrusively or not), Desch (arguing that states facing varying degrees of external and internal threat will exhibit varying degrees of civilian control), Avant (examining institutional factors and electoral politics which lead to control being exerted over the military by budgets), and Huntington (arguing that civilians can exert control over the military by professionalizing them). In each instance, civilian control over the military is both the dependent variable and the desired result by those in power. As such, any actions which act in contrast to such an end-state would be contrary to those actions desired by those in power and would exhibit bureaucratic autonomy on the part of the actor or actors that take such actions.

Institutional entrepreneurship refers to the "activities of actors who have an interest in particular institutional arrangements and who leverage resources to create new

institutions or to transform existing ones” (Maguire, Hardy, and Lawrence, 2004: 657). This entrepreneurship occurs when actors within institutions seize upon opportunities to change those same institutions to reflect a value which they hold highly (DiMaggio 1988: 14). Using this model, Ackerman’s position is that as there is an ideological capture of positions within the Executive and a focusing of military desires and positions within the Chairman of the Joint Chiefs of Staff, due to the Goldwater-Nichols Act of 1986, that the Executive reflects a position that is integrated with military leaders’ desires and ambitions. Such entrepreneurship fundamentally changes the institution, and consequently, its positions, and closes the civil-military gap in a way that reduces civilian control over the institution of the military. Such entrepreneurship can, therefore, explain the bureaucratic autonomy of officials within an institution, and stands opposed to rational choice institutionalists, who examine the relations between and among institutions.

Using either rational choice institutionalism or a theory of bureaucratic autonomy, the Judiciary, were it to be examined, could potentially offer leverage to the study of civil-military relations, and specifically, to the causes or effects of what is commonly understood to be a widening civil-military gap. At a minimum, such study closes a gap that exists in the literature, and move towards an integrated theory of civil-military relations that accounts for major institutional variables.

### The Judiciary

The preceding works, described here, address a shift in understanding from an intra-organizational issue within the military to one where it is commonly accepted that

the military interfaces and interacts with – and between – the Executive branch and the Legislature, and ideological capture of oversight institutions. While the debate is almost never whether civil-military relations are “good” or “bad” – except in the extreme circumstances of coups – the debate is framed by nearly all scholars as being a balance between the military, the Executive, and the Legislature. However, largely absent thus far in the scholarship concerning civil-military relations is the role of the Judiciary. This, however, is not to say that there is not developed doctrine by the Court and literature examining such doctrine that attempts to understand the relationship between the Judiciary and the military.

One of the only pieces on the subject of law’s role in civil-military relations – and the most recent – argues that the military is becoming detached from civilian society and the judiciary reflects such a detachment, using what is called the “separate communities” doctrine, or more commonly, the “military deference” doctrine (Mazur 2010). Under the military deference doctrine, the Court defers to the Legislature and the military and either absents itself from active consideration of a case or rules in favor of the institution of the military (Gilbert 1997). While this doctrine has been carved out by multiple cases and discussed in law review circles (Lichtman 2006; O’Connor 2007), only a few pieces have tried to bring the military deference doctrine into the larger discussion of civil-military relations.

For rational choice institutionalists, the Judiciary offers a decades old, specific doctrine that directly ties to the Judiciary, and a *prima facie* appearance that the Judiciary is involved with civil-military relations, in some capacity. Likewise, there is appeal for those who subscribe to bureaucratic autonomy in that the composition of the Judiciary is



ever-evolving, and there is evidence that demographically and experientially, the Judiciary is changing. Such a change that involves those with military experience, such as a generation of judges that are familiar with the draft and Vietnam and a similar doctrine of deferential decisions during wartime could explain the Judiciary's role in civil-military relations.

Once it is established that the Judiciary does have a role in civil-military relations, it brings up two significant questions – 1) What does the effect of minimizing or bypassing the role of the Judiciary have on the study and understanding of civil-military relations?; and 2) Is the deferential role of the Judiciary a cause or effect of a widening civil-military gap?

Mazur argues that over the past several decades, conservative lawmakers and judges have created a separate sphere of society wherein the military resides, to the detriment of society at large and civil-military relations generally (Mazur 2002; Schulman 2012). Case after case evidences deference for the legislature and its constitutional prerogative to make laws, and the military and its unique function, which creates a sense of independence, and damage the ability of civilians to control the military.

While Mazur seems to categorize the military as a passive observer in a battle being waged by social conservatives (Schulman 2012: 19), in contrast to the characterizations of Feaver, Stevenson, Langston, and Schiff, which all see the military as an active participant in civil-military relations, the true value of her work for this piece is the affirmative examination of the Judiciary as a factor in civil-military relations. She takes the position that the actions of the Judiciary – to wit, the extreme deference given

by the Supreme Court – is a product of the Legislature, but she does not interrogate whether it is a product of civil-military relations, as she states, or the impetus behind it, essentially, whether the deference is a factor in widening the gap of civil-military relations.

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<sup>1</sup> In this article by Joseph Collins and Ori Holsti, Collins responds to an article in *International Security* by Holsti that argues that the civil-military gap is widening. Collins argues that first, different values in the civil-military relations context does not necessarily create problems, and second that the gap is not widening. Holsti, responds to the critique of Collins, reasserting that the gap is widening.

<sup>2</sup> Professors Holsti and Feaver, and many others from universities located in the Research Triangle in North Carolina comprise the Triangle Institute of Strategic Studies, which has amassed large data collections on civil-military relations.

## CHAPTER 2

### ETHNOGRAPHY AND THEORY EXAMINED

Perhaps equally as important as the history of the burgeoning field of civil-military relations is the theory behind it and why it matters. Speaking of a schism between military leaders – and by extension, the military mentality – and civilian leaders is somewhat abstract. In a bit of vicious, circular logic, learning about the military and its operations is difficult because of its different mindset, but the military's different mindset makes it difficult to learn about the military and its operations.

The military mindset is unique. It is oft-depicted in movies and on television, in literature, and in news media. It is rarely spoken about by those who possess that mindset, but ubiquitous in its presence in the minds of those individuals. In an attempt to better understand this different mindset, and to draw it into more mainstream means of conversation, a new means of understanding the military will be applied. To demonstrate how this new application of theory sheds light on the military mindset, it is important to understand the culture and environment that surround and influence the individual and the organization.

How can law be, simultaneously, nearly unseen, omnipresent, *and* materially affecting lives? Certainly the simultaneous presence of two of the three factors is plausible. Law can be both omnipresent and materially affecting a person.<sup>1</sup> Equally true, law can be nearly unseen and all-powerful,<sup>2</sup> or unseen and materially affecting lives.<sup>3</sup> The simultaneous presence of each of those three factors will strike most readers, at least initially, as being incompatible with at least one of those factors; that is, what aspires to

be nearly unseen, omnipresent, and materially affecting lives must sacrifice one of those characteristics for the benefit of the other two.

Yet, such an improbable trifecta of law is found everyday, in the lives of military members. The different character of the military community lends itself to the shared presence of what would ordinarily be inapposite ideals. The overt, yet hidden law stands as the backbone of a unique culture with an equally unique purpose, permitting the existence, and indeed, reinforcement, of a construct that affects every second of every minute of every hour of every day of those governed by it, but in a manner that goes largely unseen. This unique confluence of law and authority create the environment wherein the military can affect such a prominent role in the lives of its members, but also wherein civilian judges deeply defer to the rules and policies created by the military, resulting in weakened constitutional scrutiny as it relates to the military.

The reason is a very different mentality – the military mentality. It is necessary to understand that lens, with the goal of seeing law as authority and authority as controlling.

German legal sociologist Max Weber, and the concepts of authority and space will resonate throughout this chapter, and, in turn, this dissertation. The distinctive structure and form of the military will be introduced in order to provide the background necessary for this analysis. Next, the legal structure of the military will be examined, with a specific focus on the deference afforded decisions by military courts and commanders as evidence of the difference between military and civilian life. The moral underpinnings of the military emphasize its distinctive nature as does the everyday life of a military member to show the pervasive effect of the legal and moral structure on the individual. There is a well-connected macro-micro linkage between the doctrine of the

military and its individual members. The lenses of bureaucracy, law, power, and the rationalization of education and training ground the argument that the military, at the most basic level, operates under a different form of legitimacy, and must be understood through that form of legitimacy, which permits the omnipresence of law, despite the fact that it is largely hidden from view.

### The Influence of Max Weber

Within the body of examples and history provided here, there has been a wealth of scholarly research into the legal, the moral, and the everyday life of servicemembers.<sup>4</sup> This work unifies the distinctions drawn in each of those pieces of the whole under a larger umbrella.

In the course of his study of law, sociology, and religion, Weber argued that there were three forms of authority, and that these forms of domination legitimate power, leadership, and authority (Weber 1958). This was important due to his definition of state as claiming a monopoly on the legitimate use of violence (Weber 1919). That is, for a state to use violence, that violence must be legitimated, which forces examination on the legitimacy of the state itself. The three forms of legitimate rule according to Weber are charismatic, traditional, and legal-rational (Weber 1958). These forms of authority can be loosely thought of as existing on a continuum, with each subsequent one generally succeeding the last.

Charismatic authority is so termed because it draws from the charisma of the leader. The leader evidences that he possesses the right to lead by virtue of magical powers, prophecies, heroism, etc. His followers, or as Weber defines them, “disciples”

(Whimster 2004: 139), respect his right to lead because of his unique qualities (his charisma), not because of any tradition or legal rules (Bendix 1977: 295). The leader's followers consist of those who have shown personal devotion to the ruler, and of those who possess their own charisma (Whimster 2004: 139). Weber defined the authority as "resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him" (Ritzer 2010: 132).

Traditional authority is based on a belief of the sanctity of orders and the power of rule (Whimster 2004:135), in which authority is legitimate because it "has always existed." People in power usually enjoy it because they have inherited it. Officials consist either of personal retainers (in a patrimonial regime) or of personal loyal allies, and their decisions are usually similar to those of the ruler above them, just reduced in scale, and they too are often selected based on inheritance (Bendix 1977: 295). On a smaller scale, and to serve as a demonstrative example, traditional authority is similar to the authority of a patriarchal household. In such households, patriarchs set the rules of the home, but have no staff to ensure compliance with those rules. Therefore, compliance is left to the willingness of the members of the family to respect his authority. Taking this small-scale example to Weber's ideation of traditional authority in a state, the power of the ruler is ancient, drawing on tradition, and as with the patriarchal household, the subject's belief in the system perpetuates such a power dynamic.

The third, and final form of authority that Weber contemplated on his quasi-continuum, was legal-rational authority, which is the most evolved form of authority of the three authorities. Legal-rational authority is based on a system of rules that is applied

administratively and judicially in accordance with known principles. The persons who administer those rules are appointed or elected by legal procedures. Superiors are also subject to rules that limit their powers, separate their private lives from official duties and require written documentation. This sense that the law is separate from, but yet still governing, the institution is central to Weber's focus and analysis on bureaucracy.

Within bureaucracy, Weber sought to answer the question of how societies bureaucratize and gain (and maintain) legitimacy. For Weber, rationalization and order were key to the emergence of bureaucratization, and he argued that an ideal bureaucracy was characterized by: hierarchical organization, delineated lines of authority in a fixed area of activity, action taken on the basis of and recorded in written rules, bureaucratic officials needing (and receiving) expert training, rules being implemented by neutral officials, and career advancement depending on technical qualifications judged by organization, not individuals (Swedburg 2005).

### The Military

With Weber's notions of the forms of authority unpacked, this next section will be an introduction to the military, followed by a legal, moral, and everyday understanding of the military, in an attempt to weave a tapestry that evidences law being concurrently unseen, as it is veiled in military authority, omnipotent, as it forms the backbone of order and discipline, and materially affecting the military member, as their every action is subject to a rule or code. At its conclusion, Weber is reintroduced and an analysis is performed of the various understandings relative to Weberian constructs and forms of authority.



## The Military Command Structure

There is a certain understanding upon entering the military service that the individual becomes part of the organization and that the organization gains – and maintains – a degree of control over the individual. This degree of control extends so far as to include when the military member will work and when s/he will have free time, whether or not the military member will deploy into a hostile environment, and the amount of privacy that the military member has, to provide just a few examples.

The military chain-of-command is one of the building blocks of military culture and organization. The highest-ranking unit is responsible for several intermediate units, and each of those intermediate units is responsible for several smaller units.<sup>5</sup> Likewise, with individual military members, the highest ranking member is responsible for several members below him/her, and each of those members are responsible for more junior members, and this continues until the lowest ranking member is accounted for, and taken care of.

With those hierarchal relationships come responsibility over subordinate units, and with responsibility comes action on that responsibility. It is commonplace for a superior command or supervisor to inquire of the subordinate unit or member information. While this may seem intrusive on the part of the superior command, it is in line with what is normally expected. That is, that the superior command understand what its junior commands are doing, and if they are responsible for their activities and movements, that they account for those activities and movements and coordinate them as part of their larger mission.<sup>6</sup>

Somewhat axiomatically, leadership and management in the military are taken seriously, and the traditional civilian boss-subordinate relationship differs in many ways from the degree of military management that each individual is expected to achieve over each of their charges.

### The Inference of Legality

It can be rationally inferred that military orders are presumed, and assumed to be, valid. However, the steps to have a lawful order and the legal basis for that inference merit discussion. The inference of lawfulness is directly derived from the Manual for Courts Martial, in the “Explanations” section of Punitive Articles, paragraph 14 (Article 90, Assaulting or willfully disobeying a superior commissioned officer), and is directly referenced by Punitive Articles, paragraph 16 (Article 92, Failure to obey order or regulation).

For an order to be lawful, there is an initial inference of legality, and three criteria that subject that inference to scrutiny. *Ab initio*, an order is inferred to be valid. After that initial inference, the three criteria that must be satisfied to have that order deemed legal are that the issuing officer must have valid authority, the order must bear a relationship to military duty, and there must not be a conflict between the order and the statutory or constitutional rights of the person receiving the order (10 U.S.C. §890 (c)(2)(a)(1)). Each of these criteria will be examined.

Taken verbatim from the Manual for Courts Martial, “an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at

the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime” (10 U.S.C. §890(c)(2)(a)(1); Marsh 1953).

With regard to the authority of the issuing officer, intuitively, the officer issuing the order must have the authority to give such an order. To that end, authority “may be based on law, regulation, or custom of the service” (10 U.S.C. §890 (c)(2)(a)(2); Keenan 1969; Schultz 1969). Without inquiry, there is a rebuttable presumption of an order’s validity, but with all three of these criteria present, the order will very likely be held to be valid.<sup>7</sup>

The above section serves to begin the examination of law in the military. Certainly, the black and white law is not the end of that discussion, but serves as a jumping off point in to the examination of law in the lives of the institution and its individual members.

### Law in Action

#### Structure

Military law draws its basis from federal law. The military’s criminal code is codified in federal law via Title 10 of the United States Code. However, while the military’s law is contained within the same title as the civilian, federal code, there are numerous differences both in its content and in its understanding.

Perhaps one of the most telling statements about the difference between the structure of the military and its civilian counterparts relative to law is the aphorism that being late to work isn’t a federal crime. Within the military, this adage holds true. “Any member of the armed forces who, without authority – (1) fails to go to his appointed

place of duty at the time prescribed shall be punished as a court-martial may direct” (10 U.S.C §886). That is, being late to work – failing to go to the member’s appointed place of duty at the appointed time – really is a federal crime! This adage represents only the tip of the iceberg with regard to what actions are criminalized within the Uniform Code of Military Justice (UCMJ), but do not have equivalent codification in civilian federal forums. Three categories of crimes that are exclusively found within the military are wartime crimes, disrespect crimes, and appearance crimes.

Wartime crimes are, as the title would lead one to believe, crimes committed during wartime. The providence of the military being reasonably exclusive during wartime, only a certain class of people can be convicted of these crimes, which class excluding (for the most part) civilians.<sup>8</sup> These crimes include mutiny (10 U.S.C. §894), sedition (10 U.S.C. §894), misconduct as a prisoner (10 U.S.C. §905), and malingering (10 U.S.C. §915). Describing conduct that is generally against the interests of the United States during wartime, these crimes due to that semi-exclusive province, are without equal in the civilian realm.

Another set of crimes that are codified within the military, but are not found in civilian forums are what can be termed “disrespect” crimes. These crimes revolve around disrespect towards someone, and have a uniqueness to them as against what is thought of as rude, crass, or commonplace behavior in the civilian realm. For example, within this category are contempt towards officials (10 U.S.C. §888) and disrespect towards a superior commissioned officer (10 U.S.C. §889). While the first is somewhat nebulous, the latter is analogizable to civilian life. Disrespect of a superior commissioned officer, per the elements of the crime, requires the disrespect to occur at any time and in any

place, regardless of whether the officer is present. This strikes as being much akin to a group of employees gathered together and complaining about a supervisor or speaking derogatorily about a boss, even if (and usually when) that supervisor or boss isn't present. However, it is striking to think about that break room conversation being a criminal act. It is easy to comprehend the reaction to that act as being a warning, or a written counseling, or even a suspension at the extreme end, but certainly not a crime.

The final type of military-exclusive crimes are appearance crimes. These crimes might include conduct unbecoming an officer and a gentleman (10 U.S.C. §933), adultery (10 U.S.C. §934), wrongful cohabitation (10 U.S.C. §934), and fraternization (10 U.S.C. §934). The theory behind these crimes is that while the act is not in itself criminal, the appearance of the act is prejudicial to good order and discipline, thus weakening the fabric of the military. While a business transaction with one's supervisor is likely innocuous and would not advantage that employee in evaluations, the danger is that it *could*, or more importantly, that other employees would see that relationship as privileged and the subordinate employee as benefitting from it, even if it is not the case in reality. It is the appearance, and not the reality, of these crimes that matter, and they are, again, without equal in civilian society. Beyond that however, it is evidenced in the legal treatment of military decisions that it is the good order and discipline – the legal fabric of the military – that is crucially important and a significant part of the rationale behind decisions involving military action or policy.

The uniqueness of military law does not necessarily equate to uniqueness in treatment from its civilian counterparts, but it is this work's argument, that it contributes to that treatment. The difference in treatment of military decisions and policies by

civilian courts is the basis of the military deference doctrine. To the greater point of this work, these unique rules and laws guide and bind the conduct of the members of the military, overtly placing guidelines on that conduct.

### Morality

Morality is more difficult to evidence than legal culture. It is often seen as the difference between what is right and wrong, but that seems to both blur the line between legality and morality and juxtapose individual values onto the institution of the military. To align the institutional morality with something more descriptive than what is right and wrong, this work asserts that morality can be overlaid on chivalry. The qualities included within this concept include those qualities idealized by knights, such as bravery, courtesy, honor, and integrity.

The notion of the military being deeply connected to chivalric concepts is well-established. It is engrained in literature, in custom, and in law. Within military ethos, chivalry originated in the medieval period (Sweeney 1983). From that period, the ancient code of chivalry parallels nicely to what actions and behavior are celebrated in military life today. This ancient code includes such qualities as loving one's country, never lying, not recoiling before an enemy, not showing cowardice and the preference to die fighting rather than showing weakness, and always being right and good against evil and injustice (Gautier 1891).

Within medieval literature, the concept of chivalry is further defined, typically being categorized as duties to countrymen, duties to God, and duties to women, representing itself as warrior-chivalry, religious-chivalry, and courtly-chivalry.

Examples of warrior-chivalry might include Sir Gawain, who is told to be one of the bravest Knights of the Round Table or Henry V, as depicted by Shakespeare,<sup>9</sup> and describe great bravery, compassion, loyalty, and honor by the protagonist.

Moving chivalry forward from literature and the Middle Ages to the modern period, chivalry is reflected throughout the progression of time to the modern period and in the military's ethos and its laws. In both the military's Code of Conduct and the Uniform Code of Military Justice, chivalric influence is evident, and incorporated into the training, ritual, and understanding of the members of the military. The Code of Conduct states:

- (1) I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.
- (2) I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.
- (3) If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
- (4) If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me, and will back them up in every way.
- (5) When questioned, should I become a prisoner of war, I am required to give only my name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
- (6) I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America (Executive Order 10631; Executive Order 12017; Executive Order 12633).

These six elements of the Code of Conduct harken into the medieval code, preserving integrity, defending the nation, acting with honor, and tilting instead of cowering, and are reinforced both through culture and the codification of law. These

articles of the Code of Conduct can also be seen as a basis for professionalization and standardization. The military is often termed the profession of arms, and therein lies difficulty in moving forward without defining “professionalization.” In one sense, it can be understood as ones who fought, “not because of social obligation, or duty, to fight, but for money” (Trim 2003: 4), but also as the rationalization of education and training (Weber 1921: 650), which can be reduced to criteria for the development of the military institution. Those criteria can be defined as including a discrete occupational identity, formal hierarchy, permanence, a formal pay system, or distinctive expertise and means of education, efficiency in execution of expertise, and a distinctive self-conceptualization (Trim 2003: 7-8). Analyzed through the lens of professionalization of the institution and its members, the Code of Conduct stands to establish occupational identity in the form of self-awareness, reinforce formal hierarchy and military structure, and reinforce permanence through its enduring nature.

Beyond the Code of Conduct and its overt harkening to a code of chivalry, there are also punitive articles in the UCMJ that essentially codify chivalry. Article 133 (10 U.S.C. §933), “Conduct Unbecoming an Officer and a Gentleman,” and Article 134 (10 U.S.C. §934), sometimes termed the “General Article,” are at the same time, both extraordinarily vague in meaning and interpretation and narrow in what they proscribe. Both Articles 133 and 134 have been constitutionally challenged as being void for vagueness, but they both have survived attack (*United States v. Franz* 1953; *Grafton v. United States* 1907; *Ex parte Mason* 1881; *Dynes v. Hoover* 1858). Each of these articles prohibits conduct that is prejudicial to the good order and discipline of the military, but why? As noted in the discussion on the legal culture in the military, these appearance



crimes, if committed, lower the prestige of the military. An individual act would be attributed to the whole, lowering confidence in that entity. Therefore, the specificity in each of these articles derives from the professionalization of the military, and the desire to maintain its power and chivalric aura. That is, the law, and indeed, the military, is imbued with chivalry, and this value undergirds how law and authority are interpreted.

Drawing the discussion forward to incorporate gendered examinations of the military, the Manual for Courts-Martial (MCM), which is the single-source document for the Rules of Court-Martial and the Uniform Code of Military Justice, continues notions of chivalry in a new sense. With women serving in the what is traditionally understood as a male-dominated culture in the military (Dunivin 1994; Herbert 1998), and in the past twenty years with sexual assault in the military being a hot-button issue, it is worth reevaluating the chivalric nature of the military and the rules that undergird it. While programs have been created and adapted to better train and equip servicemembers to be aware of their legal rights and the associated legal consequences concerning sexual assault, and several statutes that govern sexual contact have been amended, an argument can be conceived that, due to high-level comments about the military justice system,<sup>10</sup> and a possible amendment concerning procedure, having been discussed and debated in Congress,<sup>11</sup> the chivalric code may be pushed aside for one that keeps notions of respect, but abandons the gender stereotypes of chivalry. However, this argument does not gain strength when examined in the context of the UCMJ, and its evolution over the past thirty years. Articles 133, conduct unbecoming an officer and a gentleman, and 134, the general article, which require crimes to be connected to violations of “good order and discipline,” remain largely untouched, despite complete revisions to the MCM in 1984

(MCM 1984), 1994 (MCM 1994), 1995 (MCM 1995), 1998 (MCM 1998), 2000 (MCM 2000), 2005 (MCM 2005), 2008 (MCM 2008), and 2012 (MCM 2012), and further amendments in 2013 (Executive Order 13643), 2014 (Executive Order 13669), and 2015 (Executive Order 13696). While the interpretation of “gentlemen” in Article 133 now includes women, the verbiage remains the same. The UCMJ continues to reflect chivalric values, despite the change in gendering, mirroring values in the Code of Conduct.

### Intrusive Leadership

As previously mentioned in the introduction, the military employs a unique style of leadership that is intrusive to the personal affairs of its members. That intrusive leadership is a necessary consequence of a heavily hierarchical system. That is, leadership is performed by leaders, and the structure provided by the military, and its hierarchy, is quite intense, for several reasons that will be discussed.

The primary involvement of the military hierarchy is extensive. It includes official involvement in the medical, physical, legal, and family readiness of individual servicemembers, whether they be Soldiers, Sailors, Airmen, or Marines. While many will understand the following four areas of intrusion to be normatively “good” or “desirable,” for the servicemember, the following actions and involvement are mandatory, and disobedience is at the jeopardy of the individual who disobeys. Medical involvement in the lives of servicemembers can include the ordered receipt of vaccinations, physical examinations, and other individualized treatments for the general welfare of the individual or the unit. Physical involvement can involve an order to

exercise with a unit, and to take physical fitness tests with that unit, for the purpose of ensuring that members are fit enough to deploy, if necessary, and to meet service weight and appearance standards, generally. Legal involvement is more difficult to pin down because a commander can not order an individual to get legal advice, but can order an individual to report to a place where legal services are performed. The command discipline program requires that the unit leadership process alleged offenders, both minor and major at the appropriate forum (administrative, quasi-judicial, or judicial). Legal readiness, as differentiated from the command discipline program drives at making sure that service members receive any necessary powers of attorney, wills, or legal advice necessary to keep the unit ready to deploy. Finally, family involvement ranges from ordering servicemembers to provide financial support to their family, to specifically briefing them regarding deployments. Additionally, this family involvement includes ensuring that that single parents arrange for the safe care of their children should an incident occur, and that the family is generally taken care of through a variety of instructions and mechanisms. This involvement can even extend to where they live, with many military installations having family housing, maintaining communities of families on base.

The lawful authority of commanders to issue orders which must be obeyed is the vehicle in which this intrusive involvement occurs, but it is not the reason for issuing those orders in the first place. As has been emphasized in sections on the structure of the law and the morality inherent in its code, order, discipline, and the appearance of both order and discipline take high priority. Providing medical treatment, offering options for legal services, and holding units to identical standards, drive at the professionalization

discussed earlier, and serve to create a uniform service. As it is true that the issuance of orders is more about leadership than shoring up power through obedience, it is also true that the obedience of those orders is less about compliance for fear of punishment than it is about compliance due to cultural expectation.

Beyond compliance tied to the threat of punishment and prosecution, Tyler offers an alternative means to understand obedience. Consent and cooperation serve as the mechanism for compliance in Tyler's panel study of the residents of Chicago. The study, which was trifurcated, first demonstrated that legitimacy shapes compliance with the law. Second, the study showed that legitimacy was not rooted in experiences, in Tyler's parlance, "instrumental judgments," but was rather grounded in "procedural justice judgments." Finally, the understanding and meaning of "procedural justice" was examined, clarifying that respondents understood procedural justice in reference to noninstrumental issues. These stages, taken together, form the conclusion that people comply with legal authorities as a function of social relationships and ethical judgments, and not out of fear of punishments or to gain rewards (Tyler 1990).

Military culture aligns well with Tyler's conclusions concerning compliance. While it is true that there are legal underpinnings that criminalize certain action or inaction, law, in the military, is a tool, and not the end result. This tool helps to ensure discipline and order, but combined with leadership that attempts to understand people both in and out of uniform, camaraderie of the people within units, and the implicit truth that, due to the military being an all-volunteer force, the servicemembers *want* to be in the military, the nature of obedience turns from fear of punishment or reward toward social relationships that were (and continue to be) developed and a sense of purpose.

### The Meeting of Military and Civilian Structures

Thus far, the uniqueness of the military has been analyzed from the structure of military law, its chivalric morality, and at a micro-level, the involvement of the service on individual members. And, the rationale provided for the uniqueness has been an argument for unity and similarity as part of professionalization. However, there is another substantial reason for the military's uniqueness, which is most evident in observing the interaction between the civilian legal system and the military.

There is a unique relationship that the military enjoys with the Bill of Rights and civilian, judicial scrutiny that must be unpacked for its significance, but will not be extensively discussed. The military deference doctrine sits as an abnormality to the normal application of rules and doctrine, and evidences the uniqueness of the mission and role of the military.

Over time, the United States Supreme Court has evidenced wide deference towards the military on certain issues. "The military is, by necessity, a specialized society separate from civilian society" (O'Connor 2007: 672, quoting *Parker v. Levy* (1974)). In that same case, Justice Rehnquist, for the majority, succinctly described the difference between civilian application of the constitution and military application. He stated:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it (Parker 1974: 758).

That the treatment is affirmatively discussed is advancement from decades past. Formerly, the military was granted such deference that the Supreme Court would not hear

cases relating to military matters (Lichtman 2006: 915). “Dealing with areas of law peculiar to the military branches, the Court of Military Appeals’ judgments are normally entitled to great deference” (Middendorf 1976: 43). Moreover, “judicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged” (Rostker 1981: 70). The Supreme Court for decades was so deferential that it “refused to conduct a substantive review, no matter how lenient, of military practices (O’Connor 2000: 170). The Court subsequently began to take cases, and treated them with the deference described, *supra* (Lichtman 2006: 915). That deference was so pronounced that Earl Warren, the then-sitting Chief Justice of the United States, said in remarks given to New York University that:

So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter’s jurisdiction is most limited. Thus, the Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham* that it lacks jurisdiction to review by certiorari the decisions of military courts. (Warren 1972: 186-187).

The above unpacking of the military deference doctrine is by no means complete. But, the absence of the Supreme Court’s interpretation of law as it relates to the military does create a space for the military’s interpretation and application of authority and order. The deep roots that military culture has in its members, and that exist within the organization cause it to be unique, distinct, and wholly separate in structure and form from its civilian counterparts. This uniqueness is, as was argued, not just limited to isolated parts of the military, but is true with the whole of the organization. The military’s legal and moral structures, down to the everyday practice of leadership, are

flooded with examples of its unique culture and purpose, ultimately leading to its distinct treatment by civilian courts and entities.

### Analysis

In this chapter, an examination of the structure of the military and its differences from civilian society has been presented. Each of these differences and unique characteristics have well-informed scholarship analyzing them, but the argument is that each of these differences, unique characteristics, and causes for special analysis are not endogenous, but, they are affected, influenced, and governed by a systemic difference in the authority and legitimacy of the institution itself as against the structure and legitimizing authority of civilian society. And, this systemic difference inextricably permeates itself in the lives of its members. In that vein, this section will examine those military structures and analyze those same structures and the differences between them and civilian society using a Weberian lens focused on legitimacy and authority.

Certainly, the military reflects a traditional form of domination, but that to exist as it does, it must also reflect a legal-rational form of domination. That is, the military, due to its history, tradition, and specialized purpose, receives a unique legal analysis from civilian courts with different or watered-down constitutional scrutiny, resulting in a high degree of deference to its policies. However, this unique treatment is only possible because of the resemblance of those legal-rational policies and procedures within the traditional form of authority that the military projects.

As discussed earlier, traditional authority is based on a system in which authority is legitimate because it "has always existed." The United States military has existed since

the inception of the nation, but more importantly, it was modeled after medieval knights which provided centuries of structure and form to the military, and brought into the United States Armed Forces a sense of tradition and power, through procedures and policies that existed for centuries.

In the traditional form of authority, people in power usually enjoy it because they have inherited it. In the earlier example of the traditional patriarchal household, the patriarch inherits that position both by gender, but also by the institution of marriage. In the example of the United States military, a commander does not inherit that position by birth. While there are various requirements, including time in service, and importantly, aptitude, the position is not entirely legal-rational, as the authority of that position is conferred by the military. In the example provided in the legal structure section of disrespect crimes, the mere disrespect of someone of higher rank is codified as a criminal action. That is, the institution of the military creates authority for those who are higher ranking. In the example of the patriarch, there is no set of formal requirements to hold that position – once the position is earned, the compliance of the household is dependent on the legitimacy that they perceive the patriarch to possess. Similarly, the authority of the commander is dependent not on formal aptitude tests, but by rank, and the legitimacy that such rank confers within the institution of the armed forces.

Moving beyond the base definition provided in the introduction, traditional authority is, at its core, the belief in the continuity of sacred tradition; the imbued ideas and traditions of centuries past incorporate into its ethos and membership today. Unpacking that includes both specific analysis of definitions and terms, but also something beyond that direct analysis. Understanding the military through the lens of



traditional authority means immersing oneself in that mentality. The introduction to the military was meant to create a level of knowledge and to break that knowledge down into academic boxes, but to understand the military and its form of authority and legitimacy means going beyond those boxes and piecing all of that information together through ethnographic study and analysis.

The ethnographic study of problems is well-accepted as a means for enveloping oneself in a foreign culture. While the United States Armed Forces are not the streets of Bali, to borrow from Geertz's famous ethnographic study, there are some concepts from the study of a cockfight that apply in the present study. While the examination at bar focuses on territories that are largely within the United States, the military, between acronyms and culture, is sufficiently foreign and distinct from the commonplace of ideas and concepts that such a study can be incisive. Moreover, the culture can only be understood from the inside. Geertz, in a seminal work for the imagining of law as a cultural reality, notes that "our gaze focuses on meaning, on the ways [people] make sense of what they do – practically, morally, expressively, [...] juridically – by setting it within larger frames of signification, and how they keep those larger frames in place or try to, by organizing what they do in terms of them" (Geertz 1983: 232).

There are at least three advantageous to studying a problem ethnographically (de Volo and Schatz 2004: 268-269). These advantages include providing a check to analytic reasoning, providing explanation to behavioral outcomes, and explaining what can loosely be phrased as "identity politics." First, ethnographic methods provide a check on analytic methods by verifying that a given explanation is consistent with insider opinions. If outsider explanations are inconsistent with these opinions and explanations held

internally, then the solution is tainted. Second, these viewpoints and thoughts of insiders provide context to explain their behavioral actions, lending more credibility to any conclusions. Finally, there are power dynamics that surround identities such as nation, race, or religion, and there are political meanings that can only be understood by comprehending these power dynamics (de Volo and Schatz 2004: 268-269). Illumination of the military from an inside perspective will be fruitful in forming valuable conclusions.

The military culture is immense. Earlier in this piece, that complex culture was dissected, and examined from several different structural viewpoints. However, to comprehend the ubiquitous presence of military culture in the eyes of those that are in the military and subject to its rules and regulations, is to understand its authority on a different, elevated level, and to see the unseen, become aware of the omnipresent, and feel how the combination of the institutions of law and the military materially affect the lives of those who are governed by them.

### Military Culture as Ubiquitous and Omnipresent

Thus far, this work has argued that the military uses traditional authority vice legal-rational authority. To succeed in this end, the members of the Armed Forces must be indoctrinated into the sanctity of the orders that they follow, and, will eventually, issue. To accomplish this indoctrination, recruit training locations were established in each of the military services. These basic training camps serve several purposes, both to mold the recruit physically and vocationally, but also to mentally and culturally shape the recruit.

A fine example of recruit training from the standpoint of physically and vocationally adapting to the military can be found within the United States Army. Army basic training is broken into two parts, Basic Combat Training and Advanced Individual Training.

Basic Combat Training (BCT) consists of the first ten weeks of the total Basic Training period (Soldier Life 2016), and is identical for all Army, Army Reserve, and Army National Guard recruits, ensuring that every Soldier, regardless of their component (active or reserve), or their future position receives standardized training.<sup>12</sup> This is where individuals learn about the fundamentals of being a soldier, from combat techniques to the proper way to address a superior. So involved is this transformation that recruits must re-learn how to tell time, identify the date, and even write.

While the notion of a 24-hour clock is not exclusively used by the armed forces, its more common name, “military time,” certainly describes it as an alternative means of telling time. This method of telling time supplants common clock nomenclature, “6 a.m.” or “4 o’clock,” with more specific nomenclature. With military time, “6 a.m.” converts to “0600,” reducing the potential for miscommunication of “a.m.” or “p.m.” More drastic, “4 o’clock” might refer to 4 a.m. or 4 p.m. Military time clarifies the intent and meaning, presenting the information as “0400” or “1600,” with the times pronounced as “oh-four-hundred” (instead of four-hundred) or “sixteen-hundred.”

In addition to the time, the telling of the date is also alternatively presented from normal understanding in the United States. While a majority of citizens of the United States would write the date as “April 1,” the recruit is trained to understand, interpret, and

write the date as “1 Apr.” Should that recruit want to take “leave” – the military nomenclature for “vacation” – they would request off from “24 Jun – 10 Jul.”

Compounding the re-education of recruits in telling time and identifying dates, new recruits are also provided instruction on the “Army Writing Style.” This part of the same manual, Army Regulation (AR) 25-50, that provides instruction on how to tell the time and how to identify the date and provides instruction on how to write a sentence in the Army-style, creating generation after generation of literature, memoranda, and publications that are similar in style (Preparing and Managing Correspondence 2013), creating a larger sense of continuity and durational power, lending credence to a Weberian analysis.

Beyond the immersion experience of learning how to tell time, identify the date, and write in the military style, BCT is also where individuals undergo rigorous physical training to prepare their bodies and their minds for the eventual physical and mental strain of combat. One of the most difficult and lessons learned in BCT is self-discipline, as it introduces prospective soldiers to a strict daily schedule that entails many duties and high expectations for which most civilians are not immediately ready.

Advanced Individual Training (AIT) consists of the remainder of the total Basic Training period, and is where recruits train in the specifics of their chosen field. As such, AIT is different for each available Army career path, or Military Occupational Specialty (MOS). AIT courses can last anywhere from 6 to 52 weeks. Although many AIT schools don't center around combat the way BCT does, individuals are still continually tested for physical fitness and weapons proficiency, and upon MOS, may be subject to the same duties, strict daily schedule, and disciplinary rules as in BCT.

There is value to both portions of training, but toward the point of evidencing the power of rule and respect for authority, it is the first portion of training that is most relevant. BCT is the first exposure of the new recruits to the military, and the structure of the training combined with the first few days and hours are most telling.

The structure and purpose of Basic Training reveal much with regard to the intent of such training. The Marine Corps instruction for basic training presents a unity of the concepts above in its attempt to instill tradition and timeliness. This instillation begins with the Commander's Intent for the training program:

Transforming civilians into basically trained Marines, who are imbued with our core values of honor, courage, and commitment, is the primary focus of recruit training [...] As the Nation's premier Expeditionary "Total Force in Readiness" we will continue to instill stamina and toughness in each individual Marine while simultaneously reinforcing character that values honor, integrity, and taking care of our fellow Marines; including treating each other with dignity and respect (Marine Corps Order (MCO) 1510.32D 2003).

Prior to new military recruits ever showing up at their duty station, the program that they are being thrust into has the primary mission to transform those recruits from whatever and whoever they were prior, into warriors – even, beyond warriors, "Marines" with all of the identity that goes with that title. These Marines have instilled into them honor, courage, and commitment, the core values of the service that are the bedrock on which all else is built.

From its intent to the language that is used during the Basic Training period, recruits are exposed to concepts designed to instill in them the vestiges of tradition and honor. A prime example of this is the time following the initial processing period, but preceding the commencement of the regular training schedule. This time period, known as "forming," is where processed recruits are formed into platoons. Forming varies in

duration, depending upon how long it takes to amass a full recruit series or company to begin training. Initial housekeeping tasks, elementary training, and the actions listed in the processing phase will be accomplished (MCO 1510.32D 2003). Beyond the tasks set forth to be accomplished during this period, the name given to this evolution conjures images of clay being molded into defined shapes.

Further into the instruction, the military's degree of control over their recruits – and by extension, all of their members – becomes evident. Earlier, this chapter discussed the involvement of the military into the lives of its members, addressing medical, physical fitness, and legal necessities. The argument then was that each of those were essential to the good order and discipline of the unit, preparations to make it – and its members – deployable if circumstances necessitated. On top of those work-related intrusions into the lives of its members, the service extends itself further. Again using the Marine Corps basic training instruction as a means of evidencing the indoctrination into military culture and the establishment and imbuing of tradition and values into its members, a recruit's training day is broken up into academic hours and non-academic hours. Academic hours are used to learn and master knowledge essential to the being a Marine. Non-academic hours include administrative time dedicated to completing tasks which include:

haircuts, exchange calls, storage of personal effects, yearbook/photos, blood donations, inoculations, preparation of military identification cards, rifle and equipment issue, clothing appointments, movement time, dental recall, preparation of hometown news releases, pay, issuance of orders, and making travel arrangements.

We see that the involvement of the military – its rules, requirements, and presence – extends beyond the academic day and into the uniform shop, the public affairs office,

and even the barber shop, turning regular hair cutting appointments into a means to create compliance with appearance and uniform rules. The above activities are normally associated with errands, and the normal time to run errands is in one's free time. However, the instruction delineates what free time is for the recruits. While free time is time away from Drill Instructors and other officials, the purpose of free time is to "...allow recruits to read, write letters, [and] watch instructional television (ITV)...", suggesting that "free time" is time without formal instruction, but is far from "free."

Finally, but certainly worthy of note is the recruit's rights. Thus far, the conversation has been centered on indoctrinating recruits into the tradition of the military, changing the way that they think and act through the military's expectations of recruits and its structure. What purpose could recruit rights serve to reinforce such structure and tradition? This section begins by stating that the rights listed in the section are fundamental to the welfare of recruits and will not be denied, and then proceeds to state that included in these rights are the right to eight hours of uninterrupted sleep and one hour of free time daily, and to receive mail on the day that it arrives. However, each of those rights is caveated. Recruits have a right to "Eight hours of uninterrupted sleep, except under the conditions described in paragraph 4c(5)(f)," "One hour of free time daily, except under the conditions described in paragraph 4c(5)(g), and during processing, forming, and weapons and field/combat training, and the Crucible Event," and "Receive mail on the day it is received by the parent company except for Sundays, holidays, and during the Crucible Event."<sup>13</sup> Each of these "rights" is subject to limitation or cancellation due to military requirements or exigencies, reinforcing both the power of the

entity that is giving these rights and the mentality that these rights can be amended, abridged, or cancelled due to military need.

The notion of the recruit's rights serves to open the discussion concerning the mental and cultural shaping of the recruit. What creates the expectation that a recruit can be given a right subject to the need of the military? What forms the basis of these cultural notions of subordinate rights, but more to the point, the adoption of the military culture to the ideological exclusion of options that they would possess as a civilian?

Returning to the example of the haircut, what creates the expectation that the recruit will *want* a compliant haircut, such that they no longer ask for an alternative style, such as one that they would get had they not been in the military? Certainly the first thought is that the regulation is in place, criminalizing non-compliance. Beyond the legal consequence, there are also administrative options available. For example, in the Navy, a Sailor can be adversely marked on an annual evaluation for such non-compliance. These evaluations are a contributing factor in selection for training, career advancement, and ultimately, promotion. One of the seven scored traits is "Military Bearing/Character," with the specific guidance stating

Strict adherence of every Sailor to the highest personal and professional standards of conduct is paramount in assessing military bearing and character. This performance trait also encompasses standards of physical appearance, fitness, and readiness. To merit high marks, a Sailor must meet and model the highest standards of professionalism in demeanor, deportment, and interaction with, and treatment of, superiors, peers, and subordinates (Bureau of Personnel Instruction (BUPERSINST) 1610.10D, Enclosure (2) 2015).

More subtle than affirmatively enacting adverse legal action is marking an individual down on a performance evaluation, thusly tying compliance to both positive and negative consequences. However, while the reason for such willing compliance with exacting



rules, regulations, and customs is somewhat tied to the positive or negative consequences that create the “good order and discipline” that is specifically codified into military law, the reason for such willing compliance is much more simple.

While there are positive and negative incentives for the fringe servicemember who needs them, there are three considerations which are offered to explain willing compliance. First, as discussed in this chapter, law is used as a tool to enforce traditional authority. It is, therefore, the traditional authority that desires compliance with these specific appearance rules, and not the law, *per se*. Second, the fact that rules such as wearing the uniform properly or having the haircut that meets the appropriate regulations help to underscore and understand their importance. The wear of the uniform and the physical appearance of the servicemember are the most visible aspects of that servicemember, to both the military and civilian communities. Visible cracks in discipline undermine the public confidence in the military generally. Finally, and addressing the cultural expectation of people entering the military that they will have uniform and appearance standards is that civilians understand that current members will have to adhere to these regulations. Whether it is by familial connection, the recruiting process, or even through television and/or movies, it is generally known that membership in the military requires a specified appearance as part of a sacrifice of individual rights, and if such a sacrifice is known, it becomes part of a social contract that recruits acknowledge when they sign their name to enter the military.

While each of these three reasons are interrelated, they present different answers to the same question. For the individuals wielding the traditional authority conferred to them, they need compliance with all orders, regardless of how small, to ensure

compliance with “large” orders, such as putting oneself in physical jeopardy to complete a mission. Concerning public confidence, the military enjoys a high confidence rating. A Gallup poll in 2016 asked respondents how much confidence they, themselves had in a number of institutions. 73% replied that they either had a “great deal” or “quite a lot” of trust in the military. By contrast, that figure was 36% for the Presidency, 36% for the Supreme Court, and 6% for Congress. More to the point, historical surveys asking the same question found that the percentage of people who either had a “great deal” of confidence in the military or “quite a lot” are consistent over time. Since 1990, the combined percent has not been lower than 68%, nor has it been higher than 85% (Confidence in Institutions 2016). Public disobedience by servicemembers can certainly erode confidence in the institution by the public. Finally, concerning the public’s expectation of the military culture, movies such as *A Few Good Men* (1992), *G.I. Jane* (1997), or *American Sniper* (2014) highlight the expectation of military discipline and conduct. Even movies that involve paramilitary forces, such as *Police Academy* (1984) acknowledge the cultural expectation of the military discipline system.<sup>14</sup> The unwavering compliance to these rules on the part of the institution a) reinforces the importance of the rules and the institutional commitment to them, b) creates the expectation that recruits will comply with them, and c) can create a self-selecting effect, with people who want such regulation or discipline volunteering to join the military.

### Law as Serving Two Roles

Every aspect of the military, from its training, to its daily routine, to its morality, and certainly to its law reflects traditional authority, and the ancient power of time

immemorial. However, this form of ancient, traditional domination and legitimacy maintains its power and strength within – and adjacent to – civilian, legal-rational forms of authority by mimicking those same legal-rational constructs within the military’s traditional structure. This then requires two analyses – first, that the law is used to internally legitimize the traditional authority of the military, and second, that the law is used to satiate civilian judges who are viewing law through a legal-rational lens.

Refreshing the discussion of Marine Corps Basic Training, it was argued that it is focused on transforming civilians into members of the military, and that this is accomplished through a series of actions, rules, and behavior that reinforce such a transformation. Law, however, is not absent from this transformation. Rather, it plays a prominent role in reinforcing the mindset and behavior of the recruits. The first duty area that the recruits study as part of their academic curriculum is “Military Justice and the Law of War.” This block of study includes explanation of the military’s justice system, the identification of offenses that are punishable under the Uniform Code of Military Justice, explanation of problem solving mechanisms available to Marines should they feel aggrieved, the rights of the accused, and the forums in which a case could be heard in, with the consequences possible in each of those forums. The presentation and absorption of this material is of such emphasis and import that it is presented chronologically in advance of the organization, history, and courtesies of the Marine Corps (Marine Corps Recruit Training Matrix 2016). From this juxtaposition, it can be inferred that the rules and laws serve as a primer for interpreting the tradition of the military. That is, while it is known from earlier discussion that chivalry and battle-readiness run throughout all actions of the military, and that the authority of the military is introduced in basic training

and repeatedly reinforced. It is law internal to the military that provides a mechanism for enforcing these traditions, and providing evidence to external observers that the power of superiors is not unchecked, and appears to be based on law and rationality.

Related to affirmatively legitimating the traditional model of authority that the military represents is using the law to mimic legal-rational structures, having them subordinate to military rules and requirements, and having those mimetic structures treated as providing recourse consistent with legal-rational courts and adjudicative hearings, further externally legitimating the military model that such mimetic courts and hearings reside in. To standardize the separate services' rules and laws, the Uniform Code of Military Justice was created. The UCMJ established one system for the administration of military justice, and it superseded the Articles of War that were applicable to the Army and the Air Force, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard (Background of the UCMJ 1959: 11). The United States Judge Advocate General's School, examined the history of the UCMJ, both in terms of substantive alterations, but also the chronological happenings that either coincided or preceded amendments and/or revisions.

The various services' Articles of War, or articles of similar nomenclature, have a long history that, when traced, draws directly to the uniformity of the UCMJ across the Armed Forces. Prior to the Constitution's enacting, there were two iterations of the Articles of War. The 1775 version of the Articles was the first military justice code applicable to all of the colonies, and each subsequent iteration added procedural rules and protections. In 1776, rules were added that affected the constitution of courts-martial, which provided a more uniform means of trying cases that gave a greater sense of

procedural fairness. Revisions in 1806 and 1874 were in response to the constitutional status of the country and the immediate necessity to amend after the Civil War.

Reflecting the need to modify the code and both respond to the realities of war and add procedural protection, the Articles were completely rewritten in 1916. Most importantly, jurisdiction was clarified and requirements were put in place to modify the statutes of limitations and to raise the percentage of jury members required to convict from a bare majority to two-thirds. The 1920 version of the Articles included requirements to consult military lawyers before preferring charges and to establish of appellate tribunals and rehearings. The final revision to the Articles of War prior to the passage of the Uniform Code of Military Justice was in 1948, and it advanced many procedural points. The Articles now notably require that both the trial lawyer and the defense lawyer in a court case must be judge advocates (attorneys) while enhancing the protections against compulsory self-incrimination (Background of the UCMJ 1959: 7).

The evolution of procedural protections and the eventual uniformity of service regulations within the UCMJ evidence a progression of norms that externally legitimate the military to civilian judges. As Weberian rationalization occurred, and procedures were instilled on paper, and expected to be obeyed by those subject to them, a rational understanding was that there was a reason for any particular rule or regulation. The argument inherent in the military's position is that there is a procedure for everything, whether it is training soldiers, limiting free speech, or determining survivor benefits, and that these procedures are part and parcel to the military's unique purpose. These procedures are deferred to for reasons that have been articulated, but the refusal by military officials to abide by those military procedures – in essence, not following their

own rules – provides cause for civilian judges to argue against deference. However, short of the inability of military officials to follow the military's procedures, the deference doctrine states that the military should normally, and does in fact, win in cases against it. The evolution of, and adherence to, procedures is then the signal to civilian judges that, despite the difference in purpose and mission between the military and civilian realms, the case merits deference, permitting that same adherence to procedure to legitimate the traditional authority that the military relies on.

### Conclusion

This chapter has argued that the military, while using law and legal rationality, does not draw its power from that law. Rather, drawing from ancient notions of power and authority, the military utilizes traditional authority, drawing its power from the law and its chivalric tradition, reinforcing that power through everyday military culture. The military's relationship with the law is not just limited to buttressing its traditional authority. This relationship also acts as an intermediary with regard to the military's relationship with civilian courts and judges, serving to allow those civilian judges to acquiesce to the military's unique rules and authority due to the familiar presence of rules and procedures. These rules and procedures, when followed, equate to deference, which substantiates and externally legitimates the military and its traditional authority. The net result, therefore, for those who wear the military's cloth is that they are simultaneously affected by an omnipresent force that is unchecked by civilian counterparts, nearly unseen in that the law which is taught to them on day one of their training doesn't stand on its own but supports military authority, and materially affects their lives in that, for

example, their very “free” time is spent obeying orders and acting in a manner consistent with their training.

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<sup>1</sup> At present, the Affordable Care Act could serve as an example of this idea.

<sup>2</sup> Examples of this might include laws designed at food or building safety. To the consumer, there is almost no thought given to them, but they govern the safety of what is eaten and constructed.

<sup>3</sup> Taxes could be construed as an example of this. They are taken out of every paycheck that a person receives, but are often hidden in the eyes of people until tax forms begin to arrive by mail and email. They, however, deduct what would ordinarily be control over money from the individual to the federal and state government every pay period.

<sup>4</sup> Here, and throughout this dissertation, I use the term “servicemembers.” The rationale for this is threefold. First, while the phrase “service men” is more common during previous eras, “servicemembers” presents a gender-neutral term that recognizes the status of all members of the military. Second, the choice to use “servicemember” vice “service member” is a stylistic one. Within this dissertation, the Servicemember’s Civil Relief Act is discussed. To align with the phrasing in that Act, I also use “servicememember.” Finally, the use of “servicemember” is service-neutral, encompassing Soldiers in the Army, Sailors in the Navy, Airmen in the Air Force, and Marines in the Marine Corps. References to a gendered term of “servicemember” or a different stylistic choice, or a specific service, when used, will be left as they were used, for authenticity this work and of the cited source.

<sup>5</sup> Perhaps the clearest example of this structure is found in the United States Army, which has a Squad of 9 to 10 Soldiers reporting to a Platoon, with 16-44 Soldiers, which reports to a Company, with 62-190 Soldiers, which reports to a Battalion, with 300-1,000 Soldiers, which reports to a Brigade, with 3,000-5,000 Soldiers, which reports to a Division, with 10,000-15,000 Soldiers, which reports to a Corps, with 20,000-45,000 Soldiers, which reports to an Army, with 50,000+ Soldiers. Department of the Army Pamphlet 10-1, p53.

<sup>6</sup> This is commonly known as “intrusive leadership,” where the leader involves herself in the professional and personal lives of her military subordinates.

<sup>7</sup> In fact, there have been recent examples where persons subjected to orders questioned their lawfulness, and uniformly, courts have held that the order that was given was valid (Murdough 2010). Two such examples include Army Captain (CPT) Yolanda Huet-Vaughn and Army First Lieutenant (1LT) Ehren Watada. Notable because both cases were cases of officers refusing to obey orders, both CPT Huet-Vaughn and 1LT Watada refused to deploy to Iraq to fight what CPT Huet-Vaughn termed a “morally objectionable” war (Murdough 2010:7, citing Huet-Vaughn 1995:109). Feeling that it was her obligation to as a military person ... to expose what [she] saw at that point as—as a move to a catastrophic consequence,” CPT Vaughn argued the invalidity of the order before the Court of Appeals of the Armed Forces. Nonetheless, the Court convicted her of desertion with intent to avoid hazardous duty, noting that “to the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was irrelevant, because it pertained to a non-justiciable political question” (Murdough 2010:7, citing Huet-Vaughn 1995:115).

<sup>8</sup> 10 U.S.C. §802 (Article 2 of the UCMJ) lists the people subject to the UCMJ. Included in the list, in the tenth and eleventh subsections, respectively, are “persons serving with or accompanying an armed force in the field” and “persons serving with, employed by, or accompanying the armed forces outside the United States...,” potentially opening the door for personal jurisdiction of civilians attached to, or working with military units.

<sup>9</sup> Once more unto the breach, dear friends, once more;

Or close the wall up with our English dead.

... Dishonour not your mothers; now attest

That those whom you call’d fathers did beget you.

Be copy now to men of grosser blood,

And teach them how to war. And you, good yeoman,



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Whose limbs were made in England, show us here  
The mettle of your pasture; let us swear  
That you are worth your breeding; which I doubt not;  
For there is none of you so mean and base,  
That hath not noble lustre in your eyes.  
I see you stand like greyhounds in the slips,  
Straining upon the start. The game's afoot:  
Follow your spirit, and upon this charge  
Cry 'God for Harry, England, and Saint George!' (*Henry V* III. I).

<sup>10</sup> One of the most telling statements was by the Chairman of the Joint Chiefs of Staff, General Martin Dempsey who was quoted as saying "We're losing the confidence of the women who serve that we can solve this problem.... That's a crisis" (Garamone 2013).

<sup>11</sup> In response to the series of events, and with the sequence of events in 2013 acting as a straw that broke the camel's back, Sen Gillibrand (D-NY) and Sen. Colling (R-ME) went beyond holding hearings and introduced (and co-sponsored) the Military Justice Improvement Act (MJIA). The MJIA, as it is drafted, would amend the Uniform Code of Military Justice (UCMJ), to require decisions to court-martial where charges amount to more than one-year confinement to be made by a senior commissioned officer, of grade O-6 or higher with significant experience in such trials and who is outside the chain of command of the accused. It would additionally require each Chief of Staff of each service to establish an office which shall convene general and special courts-martial and detail judges and members. Related to potentially setting aside verdicts, the MJIA would require a convening authority (the official acting on the sentence of a court-martial), when taking any action other than approving a sentence, to prepare a written justification of such action which shall be made part of the record of the court-martial and prohibits a convening authority from: (1) dismissing or setting aside a finding of guilty, or (2) reducing a finding of guilty to a finding of guilty to a lesser included offense (MJIA, 2013).

<sup>12</sup> It is generally accepted that cultural immersion causes a foreign language to be learned faster. Paralleling that argument to the current thought, there are three arguments that are believed, but not expressly made. First, proximity to the immersion – boot camp - will cause higher degrees of acceptance and adoption of its training. Second, those who plan to continue to serve on active duty (vice reservists) will continue to be immersed in the military mindset, actively experiencing intrusive leadership and all the stated military norms, and will have a greater adherence to those norms based on that immersion. Third, those who have the longest exposure to the military culture will increase the likelihoods of acceptance and transformation by it.

<sup>13</sup> The Crucible Event is the final challenge of Marine Corps recruit training. From the Marine Corps website, "It is a 54-hour training exercise that validates the physical, mental and moral training they've endured throughout recruit training" (<http://www.mcrdpi.marines.mil/Recruit-Training/Crucible/>).

<sup>14</sup> For instance, in the haircut scene, two bombastic recruits walk into the barber shop as another recruit is preparing to have his hair cut. The recruit already waiting permits the two recruits to go in front of him, with one requesting that the barber "take it all off." After both recruits had their hair shaved off, as one expects at basic training, the original recruit who was preparing to have his hair cut re-assumes his position in the barber's chair, asking for "a little off the side" of his wavy locks. When one of the recently-shaved recruits asks the barber if such a request can be accommodated, the barber states "Sure, this ain't the Army, you know."

## CHAPTER 3

### RESEARCH METHODOLOGY

There are famous cases like *Korematsu v. United States*, 323 U.S. 214 (1944), *Frontiero v. Richardson*, 411 U.S. 677 (1973), and, recently, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which all suggest a relationship, but what is it? Is the Supreme Court engaged in accepting certiorari<sup>1</sup> cases<sup>2</sup> that involve military issues, and how do those cases even arrive at the Court? Is the civil-military gap widening or narrowing? Underpinning each of those questions is the methodology of the project to even begin to answer those questions accurately and intelligently.

#### The Initial Selection of Cases

The initial question was, having an idea of the information that was sought after for the data set, where that information could be obtained. The LexisNexis legal database was used to search for cases and to conduct research into cases, once they were identified. This database permits keyword searches, as well as case searches, maximizing the ability to catch all cases that touch upon the military, and permitting a fine filter to be used to determine relevant cases. In addition, this database's search power can be limited by date range, further increasing its ability to find potentially relevant cases, but also, examine cases and their initial correlation to events that were to come, or had already occurred.

The initial question was which database to draw information from. The United States Supreme Court Cases, Lawyer's Edition<sup>3</sup> was selected for a number of reasons. First, the database is one that includes all Supreme Court cases, and their full-text

opinions, since 1790, so any search terms or period that could be selected would be searchable, yielding fidelity that the obtained results would be as good as the search terms, and not hindered by database limitations. This database is regularly updated, and includes the current term, as opinions are usually available within several hours of release by the Court. Additionally, the database has additional features which lend themselves to more detailed research. These features include the briefs submitted to the Court, including amicus curiae briefs, and could be used for further research.

After resolving which service and database would be used, the question became searching for a set of terms that would likely yield responsive results, if there were any to be found, but the term should also be specific enough to not return every case that the Court hears in a term. To that end, the search term that was used was the rather banal “military.” What it lacks in ingenuity, it makes up with versatility. Other search terms such as the names of the services, to wit: “Army,” “Navy,” and so on, were considered, but those terms carry specificity rather than generality, and may miss search hits. Additionally, “Department of Defense,” was considered, as that Department is the official Department for the Armed Services, but while this is true, a working assumption was that “Department of Defense” is not universally known, and therefore, not referenced with consistency, leading to the same problem as the specific services had – the likelihood of missing search hits. “Military,” however, captures the essence of the search, and while there may be unresponsive results, it is believed that this search will cast the search net as to obtain relevant cases.

The next task was to determine the search period; that is, the years that would comprise the data set. The obvious left and right boundaries of choosing a timeframe that

involves the Supreme Court is to choose the first term available in archives and search the databases going forward to the most recent term. And, while civil-military relations have occurred since the nation's first armed conflicts, because the scope of study in this project is a widening gap between civilian and military institutions, the period of time that should be studied should go back at least as far as when this gap began or widened. Civil-military relations over the past two centuries have evolved, but many scholars believe that it was after the introduction of the All-Volunteer Force in 1973 where gaps between the ideals and morals of the military began to diverge from their civilian counterparts. It was the All-Volunteer Force that marked the end of the draft in the United States, causing only those people that wanted to join the military to be able to join. In step with the introduction of the All-Volunteer Force, the beginning date of the research was set at July 1, 1973, when the law took effect. As a practical matter, due to the terms of the Supreme Court, this effectively means that the beginning date for the study is October 1973, but the earlier period is both in line with the actual date that the law took effect and ensures that any cases heard outside the normal period are captured for further analysis.

Using July 1, 1973 and February 20, 2015 as the time parameters of the search, 689 results were yielded. Out of concern that the search term net was cast too thin, that using the term "military" would yield some cases, but not all cases that were relevant to the Supreme Court's interaction with, and treatment of, the military, the net was expanded to examine what would be caught with more expansive search terms. Using the same range of time and the same database constraints as the original search, the five major service branches were searched for, with the following results: "Army" yielded

788 results, “Navy” returned 453 results, “Marine Corps” had 87 search results, “Air Force” showed 293 results, and “Coast Guard” had 67 results. Each one of these cases were cross-checked against the original list of 689 cases resulting from the search for the term “military.” With each of the service search terms, there were results that were captured by the original search, but there were also a fair number of independent results. However, after reviewing the results that were not duplicated, none of the newly retrieved cases were determined to be usable.

Not to belabor the point, but by way of example, the working theory was that “Coast Guard” would be most likely to have results that did not appear on the original list. The rationale behind this hypothesis was that the Coast Guard is legally and intellectually different than common conceptions of the military. While Coast Guardsmen wear the uniform of an armed service and have rank nomenclatures that mirror the Navy (and are considered an armed service), since 2003, the Coast Guard has fallen under the purview of the Department of Homeland Security, and not the Department of Defense, making them legally distinct from those military branches that fall under the Department of Defense. Moreover, intellectually, the mission of the Coast Guard is distinct from their brothers and sisters in arms. The Coast Guard focuses, *inter alia*, on drug interdiction and search and rescue, which are fairly unique missions to their service. While each service, and especially the sea services of the Navy and the Marine Corps, work with water, Coast Guard mission profiles are distinct from their sister services. Due to those legal and intellectual distinctions, the expectation was that the highest likelihood that a case would be relevant for analysis, but not captured by the original search would occur when searching for “Coast Guard.” The new search captured

67 search results, only 12 of which were replicated in the original search. The other 55 cases were then read, using identical means as will be described in this chapter, ultimately adding no additional cases to the data set. This process was mirrored for the other service search terms.

Returning to the analysis of those 689 results, it is both descriptive and contextual, as the number of cases that involved the military were counted, but beyond that, they were then examined for substance and importance. Falsification of the initial hypothesis that the Supreme Court is involved in civil-military affairs would occur should there be either no sample size of cases that involve the military, or the cases that do involve them were of such a small number or were so insignificant (for example, purely procedural questions that did not have a real effect on civil-military relations) as to suggest that there was no substantive involvement by the Court in civil-military affairs, suggesting that the Court is, therefore, not an actor as the President and Congress are currently understood to be actors.

### Case Archetypes

At first blush, a yield of 689 cases would seem to provide ample evidence that the hypothesis that the Supreme Court was involved in civil-military affairs was not falsified. This, however, provides a good opportunity to examine the types of cases caught in the search results. In broadest strokes, there were five types of case results that were produced by the aforementioned search: non-responsive, denial of certiorari, missing nexus, Category II, and Category I. Each of these will be examined in turn.

## Non-Responsive Archetype

The largest grouping of cases out of the 689 results that were yielded were those that were non-responsive. These cases are the most diverse in their scope, due to the wide swath of territory that they cover. Indeed, these cases range from those that discuss recess appointments, to those that allege improper authority in intercepting foreign communications. Each of these cases includes the requisite search term, but for the large majority of them, their relevance is probative, at best. By way of example, included in these cases is *NLRB v. Canning*, 134 S.Ct. 2806 (2014), wherein the reference to the military is in the President making appointment to the military bench. Another reasonably well known case that was included in the search hits was *Lawrence v. Texas*, 539 U.S. 558 (2003), due to the military being referenced in support of one of the three main points in the case. The examples, however, are not limited to name-cognizable cases. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Court was asked to rule on a Massachusetts law that was being challenged on the basis that it unfairly impeded trade with Myanmar. The Court, in its findings, held that the military government of Burma changed the country to Myanmar. Another such instance occurred in *Moseley v. Secret Catalogue*, 537 U.S. 418 (2003), wherein an advertisement for a lingerie company appeared at Fort Knox, and a military resident of the installation raised a complaint that an upstart company, Victor's Secret, was potentially infringing on the established trademark of Victoria's Secret. But for the complaining party being an Army Colonel, this case has no bearing on military relations or policy, and can not be reasonably inferred to carry such meaning in analysis of the Supreme Court.

## Denial of Certiorari Archetype

Tougher than the non-purposeful mentions of the military in Supreme Court cases, were instances where one of the issues involved the military sphere, but the case was denied certiorari. A writ of certiorari is the most often seen writ by the Supreme Court. It is, in essence, leave by the Court to hear a particular case at the Supreme Court, where no appeal is available as a matter of right. As the federal court system became more complex and grand in scope, the use of the Circuit Court system subsequently increased, but the federal judiciary's workload remained high. The Courts of Appeal were created to absorb some of the excess workload, but the Supreme Court retained the use of the writ of certiorari to hear cases should they choose to. The ability to have cases heard by the Supreme Court as a matter of right has diminished over the past 100 years, both through the Judiciary Act of 1925 and the Supreme Court Case Selections Act of 1988, which has placed even greater importance on the Court's certiorari choices.

The search parameters yielded a number of cases that, on their facts, appeared promising. However, none of these cases apparently had the right to appeal to the Supreme Court and the Supreme Court did not grant the discretionary writ of certiorari. At its core, this presented a fundamental question about precedent and case law – should the cases that are factually on-point with the essence of this work, but that are denied writs of certiorari be included in the data set. Alternatively put, is the Court's denial of certiorari an implicit acknowledgement of the propriety of the lower court's decision and a tacit affirmation, or should the denial of certiorari be viewed strategically, and merit less consideration in this work as a result of that decision?



The notion of Supreme Court justices as strategic decision makers is not novel. There is ample evidence, from research to the Justices' own words, to suggest that Justices are aware that their actions and cases are not contained in a vacuum, but rather, have implications that extend farther and further beyond the instant case. Brenner and Krol, examining strategies in certiorari voting on the United States Supreme Court, conducted a review of previous thoughts concerning certiorari strategy and posited that there were at least three strategies that justices consider (1989). The three theories described were 1) the error correcting strategy, 2) the prediction strategy, and 3) the majority strategy.

The error correcting strategy asserts that there is a direct, positive relationship between voting to grant certiorari and voting to reverse the lower court decision at the final vote on the merits. This strategy was researched by Ulmer (1978), who studied the certiorari behavior of 11 justices between 1947 and 1956,<sup>4</sup> and determined that the justices were following the error correcting strategy. Subsequent study by Provine (1980: 108) and Palmer (1982) affirmed Ulmer's conclusions. However, inherent in a direct relationship between a justice voting to hear a case if s/he believes that the lower court decision is incorrect is that such a justice may be outvoted on the merits. That is, the law of a federal judicial circuit that was, to a particular justice, in error, may be the law of the United States if the justice who voted for certiorari should be outvoted on the merits (Brenner and Krol 1989:829). In essence, the justice who voted for certiorari, well intentioned as she or he may be, would be best served had they not voted to hear what may now be an unappetizing decision that binds the entirety of the United States. The authors posit that the justices as rational beings and being institutionalized into the ways

of the Court will know that a vote to grant certiorari under an error correction strategy does not guarantee actual error correction, and they offer a new theory for thought.

The alternative theory to the error correction strategy is the prediction strategy. This theory argues a similar direct relationship as the error correction strategy, but it argues that the direct relationship is between the vote to grant certiorari and being a member of the winning coalition at the final vote on the merits (Brenner and Krol 1989:829). Brenner and Krol cite *Time Magazine* in offering firsthand evidence of this theory's practicality. Quoting an unnamed Justice, one of the justices of the Berger Court is attributed with saying:

If I suspected a good decision by the lower court would be affirmed, making its application nationwide, I'd probably vote to grant. [On the other hand,] a decision may seem outrageously wrong to me but if I thought the Court would affirm it, then I'd vote to deny. I'd much prefer bad law to remain the law of the Eighth circuit of the State of Michigan than to have it become the law of the land (Brenner and Krol, 1989: 829, citing *Time Magazine*, 1972: 77).

The authors point out that it is uncertain if the justices on the Court generally pursue this strategy (1989: 829), however such a line of thought is in the same vein as other research on the strategic behavior of the justices.

The notion that justices behave strategically is hardly new. In 1964, Walter Murphy, in *Elements of Judicial Strategy*, discussed strategic behavior of justices. Eloquent in its presentation, and nearly sacrilegious in its content, Murphy set about to "explore the capabilities of the judicial branch of government to influence public policy formulation." Addressing its sacrilegious content first, a book review in the *University of Chicago Law Review* states "It is interesting to speculate as to why Professor Murphy feels that this examination of the judge as policy-maker is peculiarly within the province

of a political scientist...as distinct from a lawyer of comparable attainments” (McGowan 1965). This short-sighted swipe at the legitimacy of a crossover work between political science and law is now commonly seen in Public Law wings of Political Science departments across colleges and universities. It does, however, provide context as to the nature of what Professor Murphy was arguing. For the challenge to be so direct as to challenge the merits of mere collaboration, before even addressing the merits of the work, it speaks to the radical nature of the work. Murphy, like Pritchett, saw judicial strategy and the behavioral revolution as an exciting extension of mechanical law, transforming a law defined by an automatus application of facts to immutable law, into a law where the personalities of the justices, and subsequently, the litigators and the parties, are integral to the understanding of the field.

This, not to understate the significance to the field, and more specifically to the question of whether justices act strategically, was a seismic sea-change in understanding. Once justices are no longer seen as family-less, friendless, background-less, black holes of politics, news, and world events, they then exist as human beings who have decision-making authority, but more importantly, they have discretion. Discretion is crucial to the notion that justices are strategic. If the mandate of decision is removed from them – that is, that they can choose a decision, and one is not divined for them by century-old law books, then justices become a participant in a scene, rather than an observer. Once that status happens – that is, once the justice becomes human, the justice’s life becomes relevant because that, or any number of other factors, move to the top of cognition, and may, depending on the stimuli in a case, come to the forefront of the justice’s mind (Klein and Mitchell, eds., 2010).

With the justice harkening back on her own experiences and subconscious (or conscious) biases, the justice becomes malleable. Events like the Supreme Court's abhorrent decisions in previous, non-cognizable cases become understandable in light of that humanity. One of the most abhorrent decisions rendered by the Supreme Court came in *Korematsu v. United States*, 323 U.S. 214 (1944). This case is one of infamy, one that is so reviled that for some today, it stands as one of the worst decisions in Supreme Court history.

The facts of *Korematsu* are relatively agreed upon. The case centers around a challenge to Executive Order 9066, which ordered Japanese Americans into internment camps. The Executive Order was signed by President Franklin Roosevelt in February 1942, and authorized the Secretary of War to denote certain areas of the United States as military zones, permitting the evacuation of Japanese Americans from the coasts of the United States. As a result of the enforcement of the act, over 120,000 Japanese Americans were transported from the West Coast of the United States to internment camps.

The Supreme Court addressed the specific circumstances of Fred Korematsu, concluding that the governmental need to prevent attacks outweighed the liberty of Mr. Korematsu, and by extension, the entirety of Japanese Americans in similar circumstances.

Taken with the above context, the ruling shocks the senses and the conscience. Notwithstanding that the bellicose, tense zeitgeist influenced the thought and action of citizens, scholars, and jurists alike, in essence, wholly law-abiding American citizens of Japanese descent were ordered out of their homes, losing tangible and intangible goods –

property, jobs, money, social status – and, without being charged or convicted of any crime, they were interned not for their own protection, but against their free will. The Annenberg Classroom, on this point, notes that “the weapons [of the soldiers who were standing sentry on the wall of the internment camp] were pointed inward,” at the interned citizens (Annenberg Classroom 2016).

It is, however, the context of the situation that permits clarity through a sea of confusion in the interpretation of the decision. At the core of this line of argument is that justices are strategic, which is to say that they, at minimum, behave rationally and in response to human emotions. In examining *Korematsu*, there are multiple examples where, once context is added, the behavior of the justices, and consequently, their decision, becomes much more human. Two examples in particular where the human behavior of the justices is highlighted in *Korematsu* include the omnipresence of a bellicose environment, to wit: World War II, and the peculiar and particular role played by a Supreme Court justice in reinforcing the temporality of the war and its potential consequences.

William Tecumseh Sherman is given attribution for a now-abbreviated quote describing wartime. “War is hell.”<sup>5</sup> War is different. At first blush, this notion may be embodied in the description of a service member who is confused in the fog of war, or one who is suffering from “shell shock” or “battle fatigue,” now commonly referred to as post-traumatic stress disorder (PTSD). However, the notion that “War is hell” can be easily extended beyond the site of the battlefield and from notions of the military to civilians. “Total war,” being carefully defined as the use of civilians and prisoners of war as forced labor, commerce raiding, blockades and sieges of population centers, strategic

bombing, and revving national industry to support a wartime effort, all involve civilians being materially affected by wartime actions and decisions. That is, people who swore no oath to serve the military find themselves thrust into a position where they are materially involved in the conflict. With each of the above examples of total war occurring in World War II, it is easy to see how the civilian population of the United States could a) see the wartime opponents of the United States as dangers to their lifestyle and b) how fear could displace normal decision-making processes.

A separate, but related point is the particular role that Associate Justice Owen Roberts played in the build up of the *Korematsu* case. While justices are generally known for their decisions, and recently have been gaining attention for their questions from the bench and for their confirmation hearings, their fame generally extends no further than the courtroom or the confirmation room. This nearly iron-clad unofficial rule was broken when, in response to the Japanese bombing Pearl Harbor, President Franklin D. Roosevelt appointed Justice Roberts to head the commission investigating that incident. Media, at the time, noted that Justice Roberts was not an unbiased observer. Rather, “What the public overlooked was that Roberts had been one of the most clamorous among those screaming for an open declaration of war.” (Theobald, Flynn, and Kimmel 1945). Justice Roberts unsurprisingly returned with a report that was critical of the United States military and suggested that several flag-level officers were guilty of dereliction of duty. This report was issued to the United States Congress on January 28, 1942. The order to prevent Japanese Americans from leaving the secured military area, which was in preparation of evacuation to internment camps was issued on March 27, 1942. The order for Japanese Americans to report to Assembly Centers was issued on

May 3, 1942. Finally, Fred Korematsu was tried on June 12, 1942, and his conviction for failing to leave his home to report to an internment camp was ultimately upheld by the Supreme Court on December 18, 1944.

It is important to note that Justice Roberts was in the dissent in *Korematsu v. United States*, and the example is not asserting that he voted with the majority as a function of writing the report. Rather, it is suggesting that the report was an integral part in a chain of events that ultimately led to panic and paranoia among United States citizens, to include Supreme Court justices.

Where, under the mechanical model, justices were seen as aloof and detached from the cases that they presided over, they are now seen as parts of a working process, affected by other actors, and affecting other actors and behavior. Through this more nuanced way of seeing judicial behavior, human characteristics in the Justices in *Korematsu* can be seen – fear of invasion and total war through being American citizens and the particular proximity to preclude objectivity in as much as Justice Owen Roberts headed the commission to investigate the attack on Pearl Harbor, highlight, if nothing else, that justices are human beings and are subject to the same emotions as citizens who are not appointed to the Supreme Court experience.

Returning to the work of Brenner and Krol, and the quote, as articulated by the Justice on the Berger Court, repeated:

If I suspected a good decision by the lower court would be affirmed, making its application nationwide, I'd probably vote to grant. [On the other hand,] a decision may seem outrageously wrong to me but if I thought the Court would affirm it, then I'd vote to deny. I'd much prefer bad law to remain the law of the Eighth circuit of the State of Michigan than to have it become the law of the land (Brenner and Krol, 829, citing *Time Magazine*, 1972: 77).

It is logical, therefore, to assume that the justices generally pursue strategy, because it is so closely tied to specific and generalized instances of conduct and is in the same vein as other research on the strategic behavior of justices. The prediction strategy seemingly gains traction when viewed in the zeitgeist of the modern era of judicial behavior.

Hammond, Bonneau, and Sheehan (2005) examined the strategic and sincere decision-making processes of the justices and the Court. Implicit in the discussion of sincere and strategic decision-making is the acceptance that there is strategic decision-making. The authors explained rational choice behavior and its assumptions, and then moved to rationalize judicial behavior as superior to the attitudinal model, implying throughout the discussion that justices aren't blindly driven by partisan notions, but are instead driven by strategic considerations.

Brenner and Krol give short shrift to the prediction strategy, noting that while justices at the certiorari stage can usually predict accurately the final vote on the merits on a case, they will, on occasion, be wrong, leading to the same problem that the error correction strategy yields. Inasmuch as it leads them to their third theory, their treatment is suitable, but there are a number of research opportunities here that are not explored. While their theory is sound, and the literature on the strategic behavior of justices is prolific, one question that is necessarily implicated is whether there is evidence of their precise claim. How often do justices grant certiorari, and, given assumed policy preferences, lose on the merits?

That being said, again, the end point of their second theory serves as a jumping off point to their third theory. If it is true that justices who vote to grant certiorari, lose



on the merits, despite a strategic assessment that they might win, then a third theory is necessary. If it is to be assumed that justices are strategic players, then it can be assumed that they will vote to grant certiorari in situations where they are nearly certain that they will win on the final vote on the merits. Adapting the ideas from Baum, the majority strategy asserts that justices would be more likely to vote to grant certiorari when they are on a Court dominated by justices of similar ideology (Brenner and Krol 1989: 830, citing Baum 1977: 32). In practice, this theory argues that conservative justices, on a conservative court, will be more likely to grant certiorari than the liberals, which would be in the minority on the Court. The converse, per this theory, would similarly hold true. Liberals, on a liberal court, would be more likely to vote to grant certiorari than conservatives on the same liberal court.

Subsequent work by these same authors reassessed and reevaluated their theories on error correction and the majority strategy (1990), and a litany of other scholars contributed to the field of case selection and judicial behavior (Pritchett 1942; Boucher and Segal 1995; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Spiller and Gely 2008). While this work is not an attempt to iterate the history of a field of study, the discussion on the strategy of certiorari is meant to inform a research decision that had to be made regarding the application of cases in the data set that were denied certiorari.

Earlier, the question of what meaning was to be given to a denial of certiorari by the Supreme Court was raised. Is the Court's denial of certiorari an implicit acknowledgement of the propriety of the lower court's decision and a tacit affirmation, or should the denial of certiorari be viewed strategically, and merit less consideration in this

work as a result of that decision? The discussion, subsequent to the original inquiry, revealed that justices are strategic. Regardless of the strategy that the observer overlays with the voting patterns of certiorari, there does appear to be strategy in the certiorari voting patterns of the Court. In then answering the question, while there is great value in cases that are factually on-point, the original intent of the study is to examine the Court's relationship with the Court.

This has two meanings, both of which were thought through in the course of the study. First, a relationship between the Court and the military can be best and most effectively evidenced by the opinions that the Court issues. As such, it is appropriate to exclude from consideration cases that were not granted certiorari, because those cases, as factually appropriate as they are, were not voted on at the merits stage, making even the shallowest analysis of the law in them inapplicable.

The second meaning, however, is more complex. If this study is of the relationship between the Supreme Court and the military, then the question of what the definition of a relationship is, should be asked. Intuitively, when this question was asked, the initial thought was about behavior. While behavior can certainly take place through affirmative action (voting to grant certiorari and subsequently voting on merits), it can also take place through inaction (choosing not to act, the affirmative decision to do nothing). While models exist to predict individual justice behavior on the Supreme Court (e.g., Martin, Quinn, Ruger, and Kim 2004; Cameron and Park 2009; Katz, Bommarito, and Blackman 2014), the denials of certiorari do not provide nearly enough evidence to support a defensible conclusion with regard to intent. This was a point of great contention and thought as the process evolved, as the act of inaction, itself, is action.

However, while it is certain that justices behave strategically, absent compelling evidence stating the purpose of a denial of certiorari, it is dangerous to read strategic intent into those denials. As a consequence, and due to the lack of information regarding the denials of certiorari, the study was limited to the cases that received certiorari.

Returning to the case archetypes, two such categories of cases that were produced in the search results were examined. The majority of cases were unresponsive. While these unresponsive cases met the lax search criteria, upon a closer inspection, they did not have a sufficient connection to policy or civil-military relations to be considered in the analysis of the results. The second archetype posed a much more difficult question – cases that were on point, that had substance that could describe civil-military relations at the federal level, but cases that ultimately were denied certiorari. While these cases could help to define the relationship between the Supreme Court and the military, and while it is voluminously shown that the justices act strategically, such a correlation would be inappropriate absent specific, compelling evidence.

#### Missing Nexus / Category II Archetypes

The next case archetype that was revealed in the data were cases that had a nexus to the military, but not one that spoke to the heart of defining the relationship between the Court and the military. That is, these cases all evidenced a connection to the military, but that connection was not direct. Perhaps a clearer definition can be had through the examples that make up the category.

There are several examples that aid in the understanding of this archetype, but one that is most illuminating is one of the first cases that met this consideration: *Johnson v.*

*Robison*, 415 U.S. 361. This 1974 case was one of the first ones read and was the reason for the creation and delineation of this archetype.

The facts of this case occurred before the determined start time of examining decisions, and significantly, occurred during the draft. A conscientious objector had completed two years of alternative civilian service. Alternative civilian service was authorized in the United States under the Alternative Service Program, and it provided that anyone who was classified as 1-O (Conscientious Objector to all military service)<sup>6</sup> would be admitted to it. Anyone admitted to the program was still required to perform alternative civilian service, which included conservation work, caring for the very young or very old, educational projects, or health care.

In *Johnson*, a conscientious objector had satisfactorily completed his mandated two years of alternative civilian service and was subsequently denied education benefits under the Veterans' Readjustment Benefits Act of 1966 (38 U.S.C. §1651-1697). The complaint sought a declaratory judgment that the statutory distribution of veterans' benefits only to veterans who had served on active duty violated the First Amendment's guarantee of religious freedom and the Fifth Amendment's right of equal protection. The lower court held that the statute was violative of the Fifth Amendment, and the Supreme Court ultimately decided the case in 1973.

The Supreme Court held, 8-1, that the Veterans' Readjustment Benefits Act was constitutional, relying on three primary rationales. First, since the lawsuit desired a judicial remedy and not an administrative one, the Benefits Act did not deprive the lower court jurisdiction; second, the denial of benefits did not violate the petitioner's First Amendment rights; and third, the denial of benefits did not create an arbitrary

classification in violation of the equal protection of the laws guaranteed by the Fifth Amendment. In espousing on the second and third rationale, the Court illuminated the nexus of the case to military issues. The Court, relative to the First Amendment argument, held that the “Appellee and his class were not included as beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to include them would not rationally promote the Act's purposes” (Johnson 1974: 385). Concerning the equal protection argument, the Court made two striking points.

First,

the quantitative and qualitative distinctions between the disruption caused by military service and that caused by alternative civilian service -- military service involving a six-year commitment and far greater loss of personal freedom, and alternative civilian service involving only a two-year obligation and no requirement to leave civilian life -- form a rational basis for Congress' classification limiting educational benefits to military service veterans as a means of helping them to readjust to civilian life (Johnson 1974: 378-382).

The second point made by the Court concerning equal protection is that the statutory classification bears a rational relationship to the Act's objective of making military service more attractive.

The Court, in its citing of the legislative intent to justify why the Act was not in violation of the First Amendment was simultaneously applying a tried and true rationale of statutory interpretation, but also a near blind deference to the legitimacy of the validity of the Act. That is, the question was not whether the act was legitimate in the first place, but whether the benefits of it rationally furthered the goal of it.

Concerning the equal protection claim, the Court similarly strengthened its deference to the acts that appear to support the military. Specifically noting that the Act correlated to making military service more attractive is argument in itself that the Court is

being deferential to the military, but combined with the specific distinction that military service is a greater sacrifice than alternative civilian service, the statement is profound. The Court did not quantifiably examine such a statement for its veracity, but rather assumed that there were quantitative and qualitative distinctions between them, and then applied its least-stringent test to uphold the law as it relates to the Fifth Amendment.

Taken individually, the rationale supporting the 8-1, pro-military decision stating that the conscientious objector petitioner would not receive the same treatment and benefits as a veteran who served in the armed military, are informative, but not clear evidence that there is a connection between the Supreme Court and the military. However, in tandem, the Court's logic begins to tilt towards a cognizable connection between it and the armed services.

This case, however, was placed in a different category than the cases that formed the central basis of this study. The cases that fell into this intermediate category, what was termed "Category II," provided valuable information, and were analyzed in addition to the cases that were studied. The rationale for this case's placement into Category II was the dates. While the case was decided in March 1974, and argued in December 1973, the relevant facts all took place prior to the commencement of the all-volunteer force in 1973. Petitioner Robison applied for classification as a conscientious objector in 1966, and after the process of his determination, his two years of service at a hospital in Boston, MA, and the time to file his petition for benefits, the Veteran's Administration notified him in December 1971 that his benefit application was being denied.

Category II cases also include cases whose inclusion is merely due to a single word or thought, mentioned in passing, and are cases where the reference is more solid,

but oblique; that is, this alternative flavor of non-responsive cases were cases where the reference is not straightforward, but also is more than mere reference. Examples of this kind of case include a series of Establishment Clause cases or Servicemember's Civil Relief Act cases. In Establishment Clause cases, the notion of military chaplains being both in service to the military and preaching is either referenced or discussed (examples of which being *Hein v. Freedom from Religion Foundation*, 552 U.S. 587 (2007) (involving a challenge to the White House Office of Faith-Based and Community Initiatives), *McCreary County, KY v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (involving a challenge to visible copies of the Ten Commandments in several county courthouses), and *Bunting v. Mellen*, 541 U.S. 1019 (2004) (involving prayer at a dinner occurring at a military institute)).

Another type of Category II case are cases that mention, but don't directly focus on, the Servicemember's Civil Relief Act (SCRA). In these cases, the SCRA is mentioned, but it is not directly relevant to the case. The SCRA is a military-specific statute that expanded the previously enacted Soldiers' and Sailors' Civil Relief Act (Questions and Answers for Servicemembers 2012). The newer enactment provides broad protections to active duty and deployed military members, to include, *inter alia*, a unilateral interest rate deduction to 6% upon showing that the debt was incurred prior to military service and that the military service materially affects the member's ability to pay the debt (50 U.S.C. App §527) and termination of lease contracts (real estate or automotive, for example) without normal prepayment penalties embedded into standard contracts upon a showing of a military orders for longer than 90 days, more than 50 miles away from the original duty station (50 U.S.C. App §535). Cases that involve the SCRA

that fall into Category II can be distinguished from cases that involve the SCRA that fall into Category I based on a substantive read. If, for example, the case centered on the tolling of a statute of limitations due to the SCRA, and the central discussion was either on the policy of the SCRA or its application in the current case, that case was coded as a Category I case. However, if the same case discussed the SCRA as a statute that can toll the statute of limitations, but the case centered around another act that authorized the same end-state, the case was coded as a Category II case.

Category II cases all share a similar nexus to the military; that is, a connection that becomes evident, but because some of the facts of the cases took place outside of the scope of study, or because the Court solidly reaffirmed previous policy, without clarifying or amending it, or the case involves the Veteran's Administration and not the armed services itself, the Category II cases all fall on the periphery of the study – relevant, informative, but not specifically on-point.

### Category I Archetype

The final grouping of cases, Category I cases, are those cases that are most relevant, most informative, and the center of the analysis that was theorized and engaged. These cases are defined both through a means of exclusion and through an affirmative means of identification. The first two archetypes in this chapter, non-responsive cases and certiorari denials, share similarities in that they each have a defining flaw that makes them not appropriate to study; the first for its relevance to the scope of study due to its glancing and tangential references to the military, and the second for its inability to accurately draw conclusions based on, depending on one's perspective, the affirmative or



passive act of certiorari denial. However, there is also an affirmative means of identification for the Category I cases. Similar to Category II cases, they are cases heard and decided by the Supreme Court that deeply and intimately involve the military as a whole or one of its branches, and its relationship to another entity, whether that be Congress, retirees, civilian employees, or active duty personnel, to name a few. It is these affirmative details that cause a case to be selected as a Category I case. That is, there was a temptation in the reading of the cases that met the search criteria previously established to say that the cases that were studied would be every case that was remaining; in essence, a test of exclusion. But, such a mentality seemed too passive in the identification and selection of cases for the study. In practice, what occurred was that the first two archetypes screened themselves out, leaving what would later be called Category I cases, Category II cases, and missing nexus cases. From that pile, the cases that clearly merited consideration would go to Category I, cases that were less clear, or failed to meet all of the criteria would go to Category II, and cases that failed to have a nexus to the military would be missing nexus cases.

### Conclusion

The definition of these four types of cases – 1) the non-responsive archetype, 2) the denial of certiorari archetype, 3) the missing nexus / Category II archetype, and 4) the Category I archetype – is important, as it would – and did – provide guidance in how to treat them. While each of the cases that were read and analyzed had *some* connection to the military, setting business rules for evaluating them provided clear definition to the realm of potential cases to examine and discuss.

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<sup>1</sup> Throughout this work, if a Latin word has been incorporated into the English language, for example, “per se,” it will not be italicized. “Certiorari” has been less incorporated than other phrases, but within legal circles, it is generally incorporated, and will not be italicized through this work.

<sup>2</sup> A losing party at the appellate court level can file a writ of certiorari, which indicates that the matter is not appealed as a matter of right to the Supreme Court and request that the Court hears the case, by granting certiorari.

<sup>3</sup> U.S. Supreme Court Cases, Lawyers’ Edition

**FILE-NAME:** USLED

**COVERAGE:** Earliest opinion dated from January 1790 through current. Includes case law reported in official and parallel citations: From 1 U.S. (1790 – current); from 1 L.Ed.2d (1956 – current); 1 – 100 L.Ed. (1790 – 1956); and from 1 S.Ct. (1882 – current). Includes parallels from United States Law Weekly (U.S.L.W), and the Florida Law Weekly (Fla. L. Weekly Fed.). Includes parallels of early reporters subsequently renumbered as U.S. Reports including: 1-4 Dall. (1754 – 1806); 1 – 9 Cranch (1801 – 1815); 1 -12 Wheat. (1816 – 1827); 1 – 20 How. (1842-1857); 1 – 2 Black (1861 – 1862); and 1 – 22 Wall. (1863 – 1874). For historical purposes, this file also includes decisions from courts other than the United States Supreme Court reported in 1 – 4 U.S. (1754 – 1806), including the Federal Court of Appeals, the Supreme Court of Pennsylvania, the High Court of Errors and Appeals of Pennsylvania, the Circuit Court of the Pennsylvania District, the Common Pleas Court of Philadelphia County, the Court of Oyer and Terminer of Philadelphia, the Mayor’s Court, and the Court of Errors and Appeals of Delaware. Selected unpublished decisions from 1939.

**COVERAGE-TYPE:** Full-text

**FREQUENCY:** As received from the court

**UPDATE-SCHEDULE:** Updated regularly – Atypical update schedule/as received from the court; Full text opinions are available within 2 hours of release.

**CONTENT-SUMMARY:**

The United States Supreme Court file contains the full text opinions of all Supreme Court Lawyers’ Edition cases since 1790. In addition, all dispositions of cases that were appealed to the Supreme Court are included.

The early Supreme Court decisions (until 1875) were reported volumes named after the official court reporter. Although these volumes have subsequently been renumbered as U.S. Reports volumes 1 through 90, the cases still also carry the original cites. (For example: 1 U.S. 1 is also 1 Dall. 1; 5 U.S. 1 is also 1 Cranch 1.)

The United States Supreme Court file can be supplemented by using the United States Supreme Court Briefs file.

<sup>4</sup> This time frame encompassed natural courts led by C.J. Vinson and C.J. Warren.

<sup>5</sup> As far as I can find, the original version comes from an 1880 speech given by General Sherman, wherein he states “Some of you young men think that war is all glamour and glory, but let me tell you boys, it is all hell!”

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<sup>6</sup> A registrant must establish, to the satisfaction of the Board that his request for exemption from combatant and noncombatant military training and service in the Armed Forces is based upon moral, ethical, or religious beliefs which play a significant role in his life and that his objection to participation in war is not confined to a particular war.

## PART II

Chapter 1 laid out a generalized history of the field of civil-military relations, in addition to the question of the research, and briefly discussed the interplay of the Judiciary and the institution of the military. Related, but distinct, Chapter 2 examined the military through an ethnographic lens, applying Weberian theory to the military to assist in understanding the civil-military gap. Chapter 3 operationalized the research question and established the methodology of the research. From the methodology employed and discussed in Chapter 3, there are eighty Category I and Category II cases. These cases range from the lawfulness of the draft, to the balancing of servicemember First Amendment rights while in uniform and on base, to civilian employment rights after returning from military duty, to tort liability of contractor and medical professionals for negligence that harms servicemembers, and beyond. In Part II, the cases that were identified in Part I will be quantitatively and qualitatively analyzed, examining the case as a unit of observation, as well as many of its components, trying to ascertain if there is an identifiable civil-military gap that is either created, or extended, by the Judiciary.

Chapter 4 begins to answer the initial questions set forth by Chapter 3, but also how Chapters 1 and 2 affect these answers. One of the very first questions of the research is whether there is *some* degree of involvement among and between the military and the Judiciary, and specifically, the Supreme Court. Chapter 2 spoke of the military deference doctrine, as an institutionalized doctrine. However, is it? What is the justification for such a statement? Taking the results from the searches described in Chapter 3, there were over 700 hits for cases that referenced “military” or a specific armed force. Moreover, after substantively reviewing each one of these hits, over 100 cases discussed a significant issue in a significant way. However, numbers absent

context are at best misleading, and at worst, deceiving. Through comparative and quantitative analyses, Chapter 4 places into context the descriptive and statistical significance of the cases in the data set.

Chapter 5, in turn, will turn away from a purely quantitative examination of the data, and will begin to try to understand the civil-military gap. While the plain language of Supreme Court opinions suggests that there is separation between civilian and military communities, the argument is that categorizing that separation as a singular entity is deceiving, as there are multiple separations, each with their own criteria for examination. Each of these separations will be described and defined, and the cases in the data set will be examined through these separate lenses to better see these gaps, in practice.

With the lenses of examination defined and operationalized in Chapter 5, Chapter 6 will examine the results of leveraging those criteria against the data set cases. When are these gaps discussed, and more importantly, how are they discussed? Does their discussion correlate with particular justices or issues before the Court? What reasons might explain an institutionalized gap?

## CHAPTER 4

### QUANTITATIVE EXAMINATION

For descriptive or statistical numbers and causations to matter, there has to be a correlation to the number of cases that the Court hears – that is, the subject of this study can not exist in a vacuum, but rather, it must be compared to the world of Supreme Court cases to, *ab initio*, determine its relevance compared to the whole.

The Sourcebook of Criminal Justice Statistics (The Sourcebook), managed by the University at Albany, reports that there were 25,027 petitions for writs of certiorari from 2007-2010. The Sourcebook has four categories of cases: 1) criminal, 2) United States – civil, 3) private – civil, and 4) administrative. Including only the United States – civil, private civil, and administrative cases, since the Court did not grant any petitions for the military coming from criminal law, there are 13,910 cases remaining. The Sourcebook further reports the success rate of each type of petition for the writ of certiorari. After applying the provided success rates to each respective category (success rate of, for example, United States – civil petitions, multiplied by the number of petitions in that category), the actual number of granted petitions in a particular category can be arrived at. Through this means, it was calculated that 361 non-criminal cases were granted certiorari. From the data set, for the same time period of 2007-2010, there were 48 cases that met the established search criteria, meaning that 13.2% of non-criminal cases (and, if one were to include criminal cases, 6.6%) of cases granted certiorari were “military cases.” As was discussed in Chapter 2, a search hit does not necessarily mean a responsive result. As such, the more stringent substantive criteria were applied to cases from the same time period, and from 2007-2010, there were twelve cases that applied,

meaning that over 3.3% of military, criminal cases that were granted certiorari by the United States Supreme Court during the four-year period from 2007-2010 directly involved the United States military, which is still greater than the 1.44% (361/25027) of all cases granted certiorari between 2007-2010. By the most stringent standard, the rate of certiorari for *only* military, criminal cases exceeded the rate for all cases by 229%. Using equivalent analyses, the rate for certiorari for all cases in the data set was 916% greater than the rate of certiorari for all cases in the same time period. While this test of significance and importance does not replace a substantive analysis of the cases, it does offer context and evidences that the caseload that the Supreme Court agrees to hear has a definite military presence.

While this descriptive examination informs us that the Supreme Court treats military cases differently than others, and potentially supporting and furthering cue theory, which examines cues present in cases that support the likelihood that the Supreme Court will take a case by issuing a writ of certiorari (Tanenhaus, et al. 1963), there are more telling means of examination that can be leveraged to better answer *how* the Court engages the military and what the nature of this unique relationship between the Court and the military is. Is the Court more unified in military cases? Does Court composition affect majority size? What leverage does a larger majority evidence?

What are the reasons why a majority might be greater in size in some cases or areas and smaller in others? Recently, scholarship has found that larger majorities in cases result in those cases being both less criticized and more unlikely to be overturned (Benjamin and Desmarais 2012). This work is in line with that work and examine *why* certain cases have stronger majority sizes, which in turn lead to those opinions which,



over time, are criticized and overruled less than those cases with smaller majorities (for e.g., 5-4).<sup>1</sup>

In light of *Bush v. Gore*, 531 U.S. 98 (2000), and the previously-anticipated result in the Affordable Care Act cases, the Supreme Court has been painted by many scholars and commentators with a partisan brush. Accordingly, it is perhaps best to discuss the attitudinal model of decision-making to frame the discussion. Boiled down to its essential elements, the attitudinal model of judicial decision-making argues that Justices make decisions based on pre-existing policy preferences, allowing their opinions and morals to guide them in any given case (Mishler and Sheehan 1996). Relative to Supreme Court majority size, this model would argue that the majority in any given case could be ascertained by the number of conservative or liberal Justices on the Court at any given time. Certainly, an issue for this model in its blunt application to majority size would be that not all ideologues are created equal, as there might be varying degrees of an ideologue that may argue for different levels of a remedy, or even ideologues who have opinions on certain issues that could best be described as being held by an opposing ideologue (e.g., Conservatives holding mostly conservative beliefs, but also holding a traditionally liberal belief, as well). While there may be answers to be found using the attitudinal model, the theory that explains increased majority size must go beyond that singular explanation, and this work examines not individual case outcomes, but rather, majority size.

A more sensitive analysis than the attitudinal model was advanced by Martin, Quinn, Ruger, and Kim in their 2004 work on competing approaches to predicting Supreme Court decision-making (Martin, et al. 2004). They argued in their model that

each Justice may have different positions, and therefore, different case outcomes, depending on the issue area. This presented a natural question – if issue is one area where Justices may vote differently, is it attributable to the Justices themselves, or to the issue itself? This work seeks to answer the latter question, as it tested the issue area of a case over time, and observed the change in majority size.

Another theory that has been advanced with regard to Supreme Court decision-making was that of Robert Dahl, where he argued that decision-making is representative of the ideology of the President that appointed the Justice (Dahl 1957). Succinctly put, “the predominant pattern of Supreme Court policy at any given time reflects the appointments that Presidents make” (Baum 1995). Indeed, within the Supreme Court, sub-groups form, and those groups are traditionally aligned together (Ulmer 1965; Brams, et al. 2014). This argument was refined by Lindquist, Yalof, and Clark in their work, which examined cohesive and divisive voting within Presidential blocs (Lindquist, et al. 2000). A necessary prerequisite of Lindquist’s work was defining and identifying cohesive blocs in voting patterns. That basic assumption that blocs exist forced the question of whether certain qualities possessed by the members of those blocs could influence the strength and stability of the bloc.

Stepping away from pure public law and political science literature, there is utility in examining social psychology literature to answer this question. Due to the nature of Supreme Court opinion writing, any Justice in the majority has an opportunity to write the majority opinion, as it is assigned by the Senior Justice in the majority. Over the course of multiple terms, and across all issues, every Justice will, at some point be in the

majority. Each individual Justice on the Court has their own leadership style, and implicitly, their own leadership theory (Hughes, et al. 1993; Kobylka 1989).

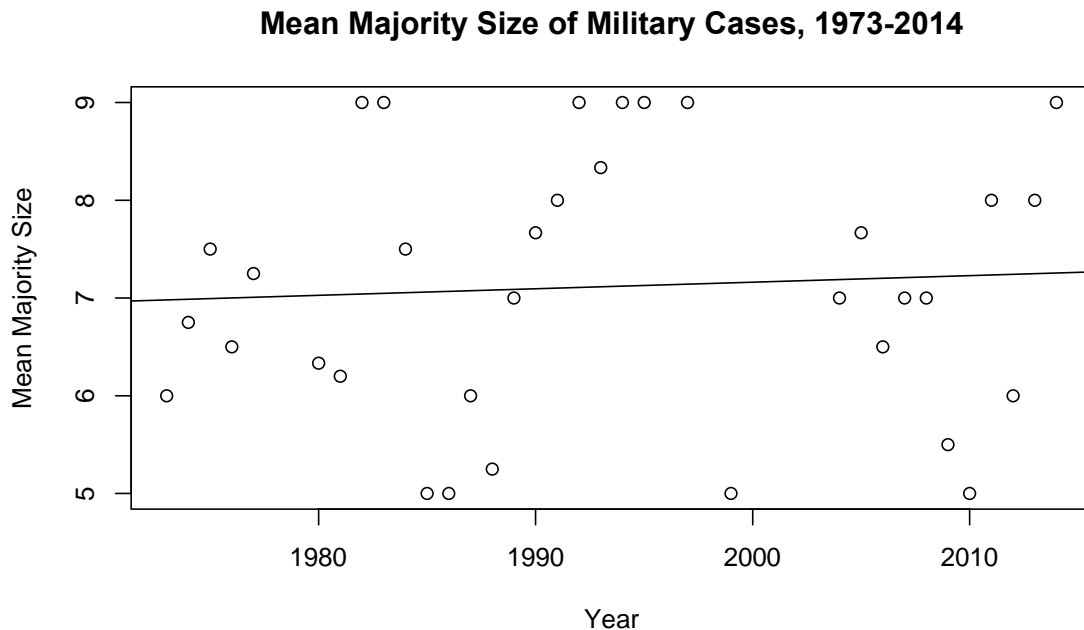
### Empirical Analysis

The Supreme Court Database was used, and specifically the Case-Centered Database, “Cases Organized by Issue/Legal Provision” (Spaeth, et al. 2016). This work drew analyzed the data from 1973 to 2014, by term. To add methodological rigor, the data was divided into two samples, a training sample and a validation sample. Because the data set is comprised of only 42 chronological observations, a potential issue was observed that caused a reconsideration on how to randomize the data set. Due to the small number of samples, there was concern that a randomization by years would yield temporal gaps that would be too large to be sensitive to subtle shifts over time. Ultimately, a decision was made to randomize all cases within each term and draw two separate samples from the case level. While this shrinks the actual size of each subsample, it represents each year and each category within each year, and ultimately adds robustness while minimizing the methodological problems with double sampling from the data. In every case, the measured majority size was the dependent variable, with varying independent variables tested to demonstrate or disprove influence. At the end of that procedure, data was then drawn from the full sample, to minimize the issue of analyzing a sample with too few observations. The reflected product that follows is the end of those sampling and statistical procedures.<sup>2</sup>

## Majority Size Over Time

Generally speaking, mean majority size across all cases and conflicts before the Court has grown over time. This relationship is positive, but not statistically significant (slope = 0.003, p-value = 0.3595), evidencing that per term, the mean majority size in all cases heard by the Supreme Court increased by .003 votes. This is graphically depicted, below, in Figure 1.

**Figure 1: Mean Majority Size of Military Cases, 1973-2014**



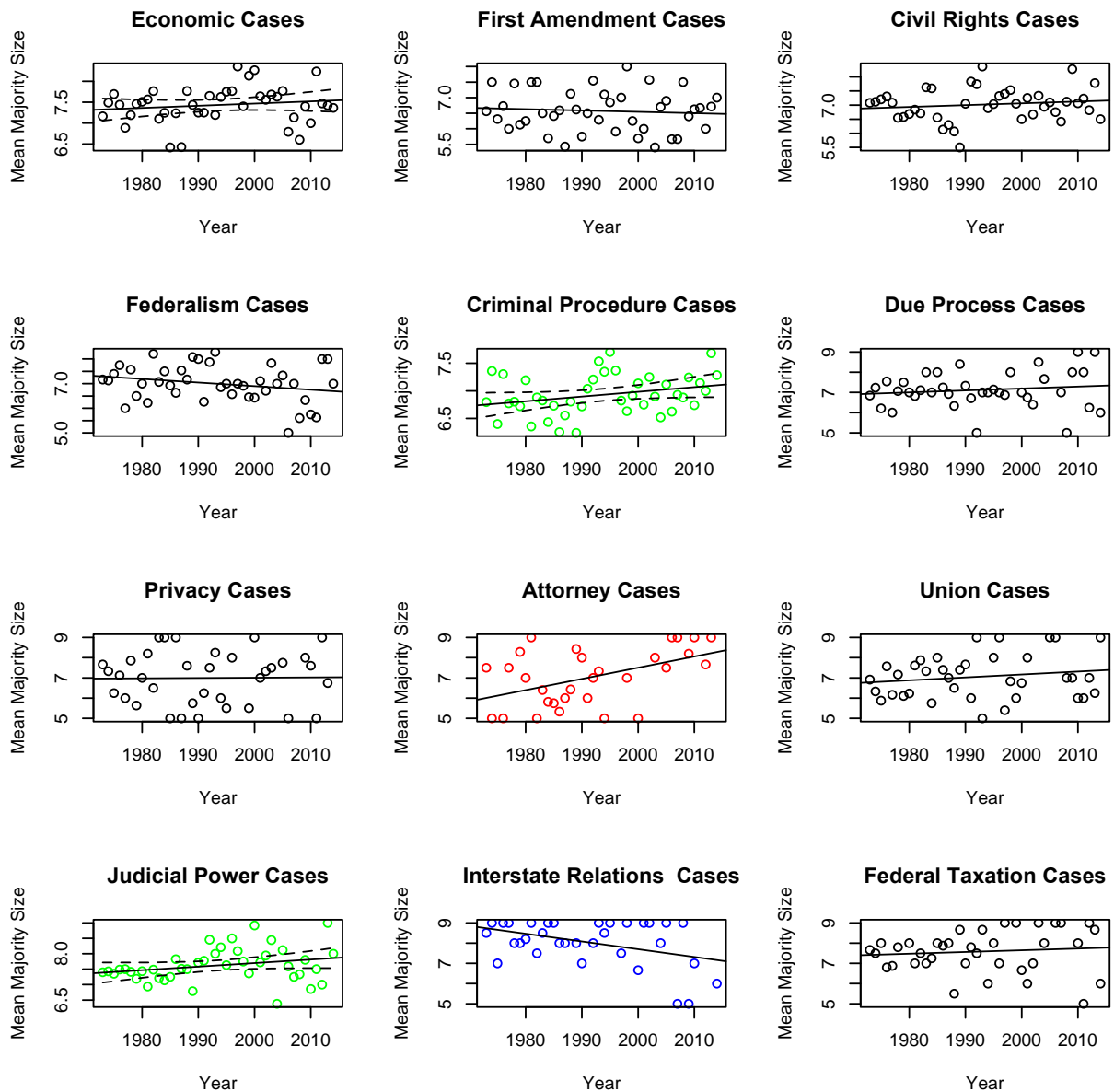
While there is a relationship between mean majority size and term, this is potentially confusing due to the sheer number of factors that are encapsulated in this plot, but that are not controlled for, as well as the deceptively small slope. Broad factors such as the issue area of the cases and individual factors, such as the then-sitting Chief Justice, the mean Martin-Quinn scores of the then-sitting justices, and the opinion writer of every case, were then controlled for in subsequent analyses.

The first examination was of issue area over time. This analysis obviously does not account for individual Justices and their characteristics, but rather, reflects general movement over time of mean majority size relative to issue area. Using the Supreme Court Database (SCDB), each of twelve issue areas were subsetted to create twelve separate groups from the whole of all Supreme Court cases, divided only by issue area. From those subsets, mean majority sizes for each year in each issue area from 1973-2014 were examined. Predictably, for many issues, there was no statistical significance to between mean majority size in a given issue area and year in the test sample. For example, it is difficult to create a logical hypothesis that correlates the majority size in federal taxation cases to term. But, these issue area subsets served as a means of context for the military issue subset that was to be performed. By examining twelve different issue subsets, there may have been trends, either uniform or isolated, that developed. These results were plotted each of the relationships by issue area, and the results are included in Figure 2. For visual convenience, significance at the 0.01 level is denoted by red points, significance at the 0.05 level is denoted by blue points, and significance at the 0.1 level is denoted by green points.

As expected, there were several issue area plots that did not yield any definitive result. Amongst several other types of cases, the mean majority size in First Amendment cases, Economic cases, Privacy cases, and Federalism cases did not evidence statistical significance when measured over time. However, the absence of results in some types of cases did not mean that there was such an absence in all types of cases. In the types of cases that were observed to have relationships, many of the relationships appeared to be linear, and the linear regression is the default regression in these cases unless otherwise

noted. However, it was noted that several plots appeared to show curvilinear trends, and polynomial regressions were conducted to test the relationships between the independent variable and the mean majority size in Civil Rights cases, Judicial Power cases, and Due Process cases. Those regressions were conducted, but ultimately proved non-significant.

**Figure 2: Mean Majority Size of Categories of Cases**

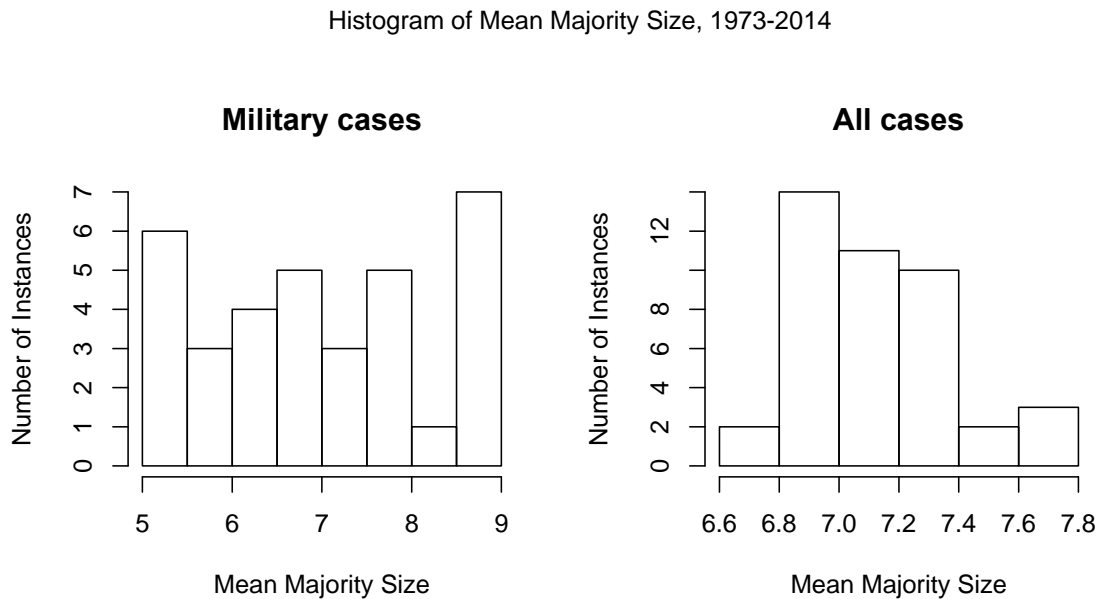


Ultimately, while the above analyses provide fertile ground for future research on majority size over time, in the context of the current discussion and purpose, they provide

a proof of concept, of sorts. While the study of the entirety of Supreme Court majority sizes over time leads to muddled results, individual areas can be pulled out and examined, both through visual observation and explanation, and with a degree of statistical significance.

The first examination that was conducted relative to majority size and military cases was to create a data set, and populate it with all of the Category I and II cases, sorted by year. This data set had 80 cases, distributed into 42 bins, with each bin representing a year. Each year had the cases that fell into it averaged by their majority sizes to create 42 data points that were then plotted on their own, to see if there was any statistical significance, and then were compared to the majority sizes of all cases over those same 42 terms. Majority by term, instead of topic, was examined because it has the advantage of normalizing the number of justices on the bench. While cases, sorted topically, examine issue areas, it is difficult to compare the majority size of these cases to other issue areas, since there may be a number of cases that take place in terms, with a full bench, as opposed to terms where there are less than nine justices. In those shortened terms, the maximum majority size for that particular case is below the maximum majority size in full terms. Cases in terms that have less than nine judges, will be compared against the average of all cases in that term with less than nine justices. The results of that term-by-term, issue area analysis of military cases to all cases to military cases by majority size, is in Figure 3.

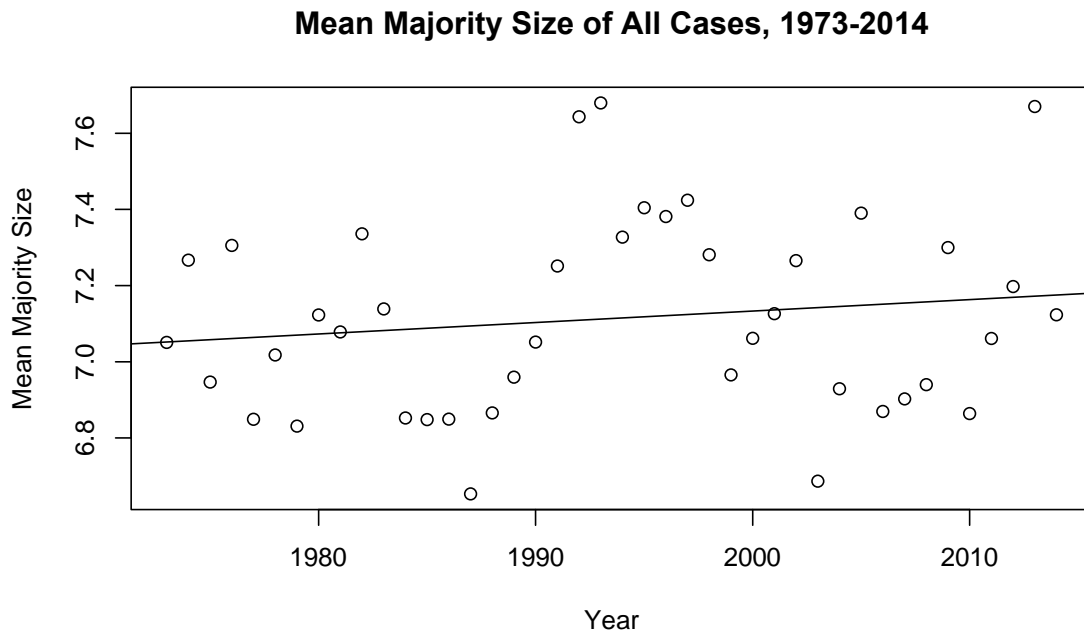
**Figure 3: Comparative Histogram of Mean Majority Sizes of Military and All cases**



The most evident result that comes from visually examining the data is that the mean majority size for all cases is tightly grouped, and the mean majority size for military cases has a much broader range, almost appearing to be bimodal against the tight, almost-bell curve presentation in the histogram of all cases. One of the advantages of the histogram is that it can show summarized numbers, but it does not show trends or patterns very well. As a result, the scatterplot of all cases for military cases was duplicated, and compared against the plot of the mean majority size for each term in all cases, in Figure 4.



**Figure 4: Mean Majority Size of All Cases, 1973-2014**



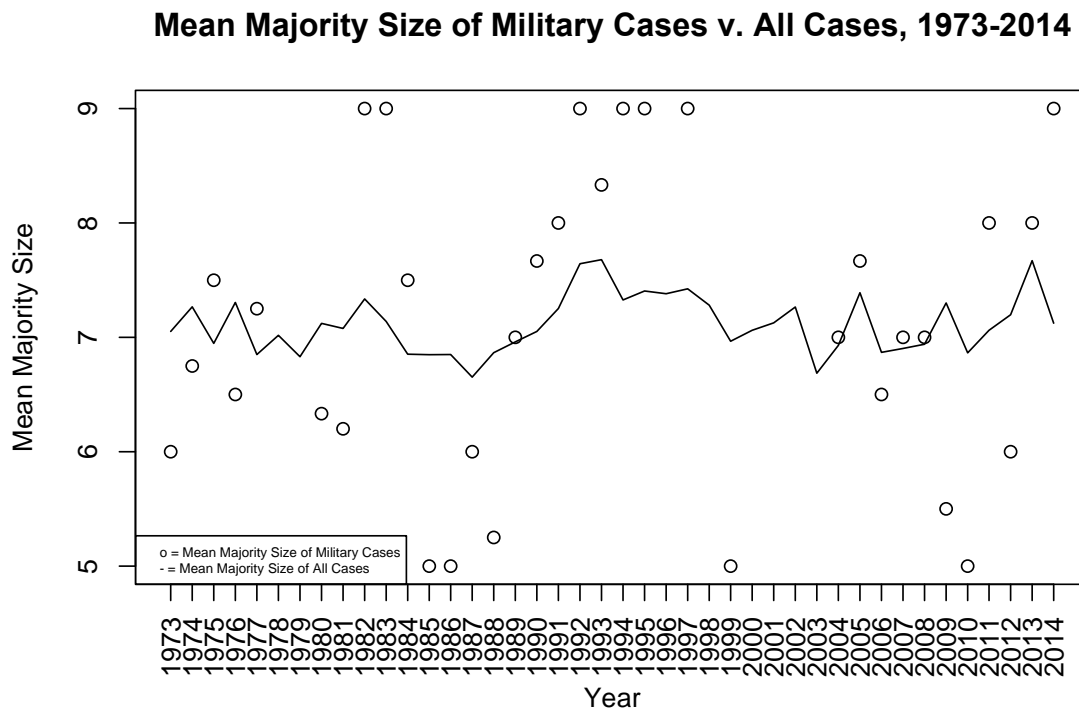
Equally important as the degree of significance demonstrated in Figures 2 and 4 is the substantive interpretation of that significance. Each of the coefficients for slope of the dependent variable, years from 1946-2005, were positive, and at first blush, weak. Specifically, criminal procedure cases had a slope of 0.004, judicial power cases had a slope of 0.011, and attorney cases had a slope of 0.055.<sup>3</sup> Somewhat axiomatically, though it is important to define to substantively interpret the results, slope is the change in votes per year. It is equally important to note that the range of all possible values of the dependent variable, mean majority votes by issue area, is five to nine, as no majority can ever have less than five votes, and similarly can never have more than nine votes. While the slopes appear small, over the course of forty-two years, the total gain in mean majority votes for criminal procedure cases, judicial power cases, and economic cases were approximately 0.168, 0.462, and 2.31 votes, respectively. That is to say that in any given case, by definition, the change could never be more than four votes (that is, the

change from five votes – a simple majority – to nine votes – a unanimous Court – and over the course of the period studied, the mean majority size of judicial power cases, for example, increased by approximately one vote. As a result of the magnitude of the collective change, it is argued that the slopes mentioned above, while small, are both statistically significant and substantively significant.

While the slope may indicate a significant change of votes, such significance can only be attached when accompanied with statistical significance. In Figure 5, the Mean Majority Size of Military Cases, 1973-2014, the change in the majority size for military cases per year is 0.006, translating to a 0.277 vote increase over the period of study, but the p-value for the regression line is 0.72, which does not nearly approach statistical significance. As a result, the null hypothesis that the majority size of the military is statistically significant as against the majority size in all cases cannot be rejected.

Beyond statistical significance, the mean majority size against all other cases was observed to see if optics picked up on any patterns or information that statistics could not. Accordingly, the mean majority size of military cases by term and the mean majority size of all cases by term was compiled and compared, and plotted together, to examine their patterns and see if any discernment of the data would be more present graphically than would be through regression analysis. In the graphical depiction that follows in Figure 5, the dots represent the mean majority size of military cases by term, the lines represent connections between points that represent the mean majority size by term of all cases before the Supreme Court. This overlay was done with the x-axis, term, being the variable in common.

**Figure 5: Mean Majority Size of Military Cases v. All Cases, 1973-2014**



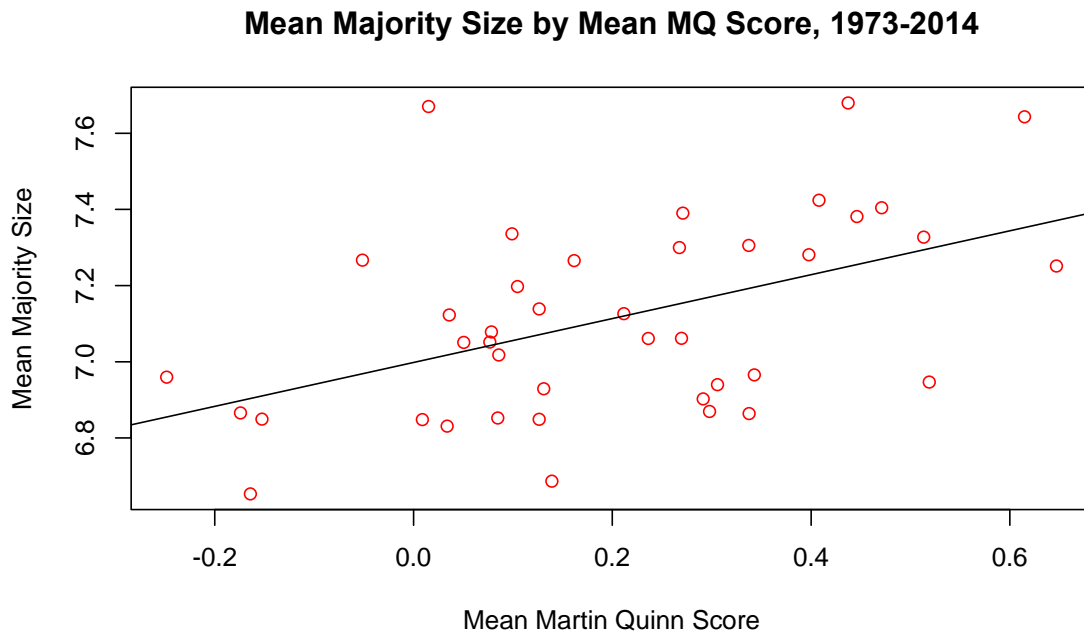
Descriptively, this plot fills in the data that was not readily apparent from the regression analysis conducted previously. The fairly consistent majority size of all cases hovers at or around seven votes, and while it fluctuates a bit up or down, it never goes below six votes nor above eight votes. This consistency is contrasted with the relative inconsistency of the mean majority size of military cases, oscillating between five votes, seven votes, and nine votes. While there may be any number of substantive reasons why this is the case, one of the simplest explanations is that there is simply a lack of data. Even using the most expansive interpretation of methodology, to permit the most cases, there were less than, on average, two cases per year, and in actuality, there were a number of years with no data and other years where there were three, four, or even five cases per term. This inconsistent presentation of information, both through the creation of data points and the lack of data to generate a sufficient sample size constrict the capacity to

quantitatively conclude that the Supreme Court treats the military differently as against all other cases.

### Martin-Quinn Score Analysis

The Martin-Quinn method serves as a means to evaluate the combinations in which different justices vote over time. This variable is taken from the Supreme Court Database, and based on a number of factors, a numeric score is given to each Supreme Court Justice, in each term. Justices with larger negative scores indicate liberal positions, whereas justices with larger positive scores indicate conservative positions. Justices with scores around zero indicate an equal likelihood of voting liberally or conservatively. In examining the data and the nature of the variable, it was speculated that there would be a parabolic regression line. That is, as the mean Martin-Quinn score was either towards the higher ends of the scale either negatively or positively, mean majority size would increase, since there would be similarly situated ideologues on the Court at the same time. However, when the mean Martin-Quinn scores approached zero from either direction (positive or negative), the Court would be either a) ideologically split with strong ideologues opposing each other or b) there would be no strong ideological presence on the Court, and many of the Justices would be weakly positioned with Martin-Quinn scores that approached zero. Phrased another way, if the mean Martin-Quinn score approached zero, then the likelihood of having a large majority would be less likely as the justices would be equally likely to vote on either side of the issue.

**Figure 6: Mean Majority Size by Martin-Quinn Score, 1973-2014**

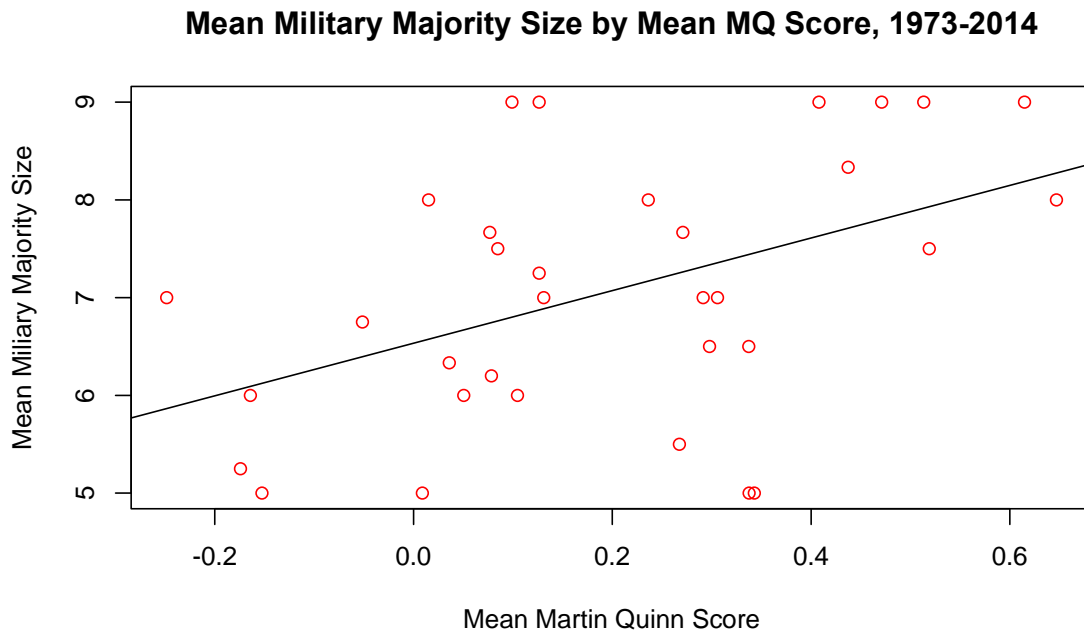


After creating a data set of the mean Martin-Quinn scores and plotting it against the mean majority size variable that was established earlier, it was observed that there was not a parabolic distribution, but an apparent linear one, and accordingly, the data set was tested with a linear regression. That regression evidenced a relationship that was significant at the 0.01 level ( $p\text{-value} = 0.0014$ ). The graphical plot of that relationship is shown in Figure 6, above. While this relationship is apparently very strong, due to the lack of observations of that are below zero (negative Martin-Quinn scores), it is difficult to rule out that the presentation is, in fact, parabolic. Either way, however, the observed plots strongly correlate mean majority size and mean Martin-Quinn score.

Like earlier, with the subsetting of issue areas from the whole of the Supreme Court Database, the subset by Martin-Quinn score and mean majority size show proof of concept, and provide a baseline for understanding the theory of examining the same for military cases. In this examination, a similar regression line and statistical significance

would argue that the null hypothesis, that is, the military is not treated differently by the Supreme Court, could not be rejected.

**Figure 7: Mean Military Majority Size by Martin-Quinn Score, 1973-2014**



As was done to create Figure 6, the mean military majority size was plotted against the mean Martin-Quinn scores per term, and it yielded the above plot, Figure 7. As earlier, a linear regression was conducted to determine any potential statistical significance. Understanding that like earlier, there are sample size limitations, due to having eighty-one samples and forty-two observations, in the form of terms, this plot removes a bit of that limitation by plotting two variables against each other and looking for correlation. Here, like above, there is significance at the 0.01 level ( $p\text{-value} = 0.0059$ ). While the  $p\text{-value}$  is over four times as high as the earlier plot, it is still safely within the 0.01 level, and indicates strong evidence against the null hypothesis that the two are not related. However, due to the striking similarity to the previous plot,

somewhat counterintuitively, the low p-value, which is normally prized, does not differentiate enough from the previous plot as to reject the null hypothesis that the two are not distinct. That is, given the hypothesis that the Court treats the military differently than it treats all other issues and parties that appear before it, Figures 6 and 7, taken together, are not sufficient to evidence that difference due to their similarity.

The third attempt at quantitatively understanding military decisions through the Court and its Justices was inspired by the politics of judicial appointment and the attitudinal model. There are a plethora of articles and beliefs that argue that the military is a conservative institution. For instance, Dunivin examined the change and evolution of military culture and discussed the CMW – combat, masculine warrior – paradigm, and the traditional model of military culture (1994). In looking at the growing role of women in the military, Herbert, in her book, *ab initio*, starts with the idea that the military, at its core, is a “highly traditional, primarily conservative institution,” where innovation is measured against the masculine definition of military culture (Herbert 1998:10). Most powerfully, Huntington, in his seminal novel, addressed the military officer and conservative realism, discussing the military mindset, the primacy of the nation state, and security threats in general (Huntington 1957). Based on that belief, it should extend that cases involving the military would tend to evoke more favorable perspectives from conservative jurists. To that end, two measures of examination were conceived and hypothesized.

The first measure examined the party of the President who appointed every Supreme Court justice who sat from 1973 to 2014. Drawing from the bloc-voting study that Lindquist, Yalof, and Clark conducted, which examined Presidential appointments to

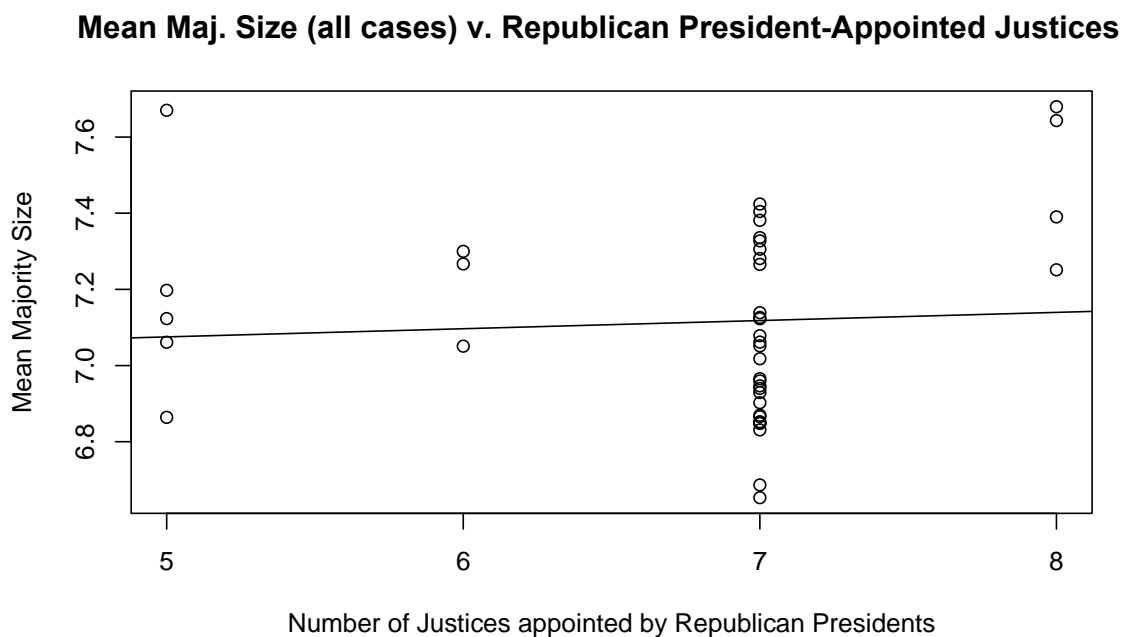
the Supreme Court, and using conservative realism as a potential bloc, this examination will examine political appointment as a heuristic for voting preference. While this method suffers from two innate issues, it can provide illumination on bloc voting. The first methodological issue is that there is a small range in terms of number of Supreme Court Justices appointed by Republican Presidents. For the period of study, there were no less than five Justices and as high as eight Justices appointed by Republican Presidents, making the range only four Justices, with the majority of terms having seven Republican-appointed Justices. The second methodological issue is not immediately evident from the plot, but it draws from a knowledge of the Court. The Court is generally static from year to year, with infrequent changes in membership. Over the course of the period of study, there were multiple appointments of new Justices, but the number of Justices appointed by Republican Presidents changed seven times. As such, there is a good, but diminished, opportunity to attribute changes in the Court to those seven changes when there were so many more changes to the natural court over that same time frame. That is, there were multiple instances when a retiring Justice and the Justice nominated to appoint him were appointed by a President from the same party, causing a new natural court, but not changing the number of Republican-appointed Justices on the Court.

While there are methodological limitations to this application, there is an intrinsic positive component to it: the changes to the Court caused the number of Republican-appointed Justices to rise from five to eight, and then to decrease to five by the end of the period studied. That is, the rise and fall of the number of Republican-appointed Justices in-and-of itself falsifies a static increase in majority size of military cases being



attributable to an attitudinal model of judicial politics. That is, an increase in the majority size can not be solely explained by a rising number of conservative Justices, due to the parabolic rise and fall of the number of Republican-appointed Justices on the Supreme Court. Below, in Figure 8, are the results of the plot of the number of Republican-appointed Justices against the mean majority size of all cases, from 1973-2014.

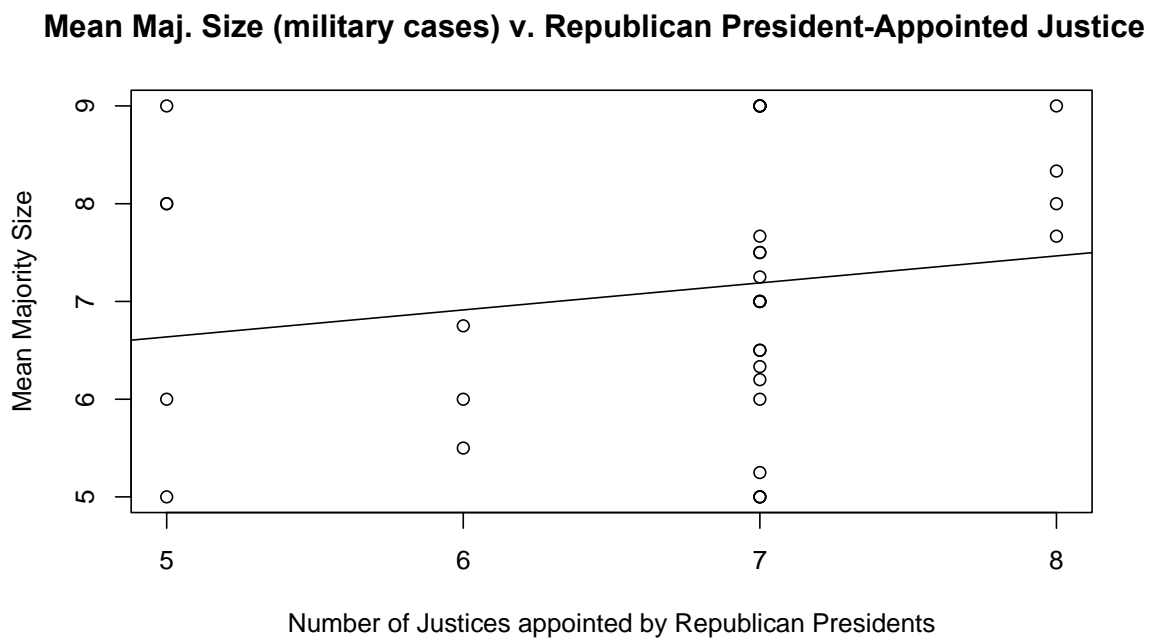
**Figure 8: Mean Majority Size of all cases v. Justices Appointed by Republican Presidents, 1973-2014 (with regression)**



With five Republican-appointed Justices on the Court, the mean majority size ranged from just over 6.8 to over 7.6, with a majority of the points being located between 7.0 and 7.2 votes in the majority per case. With six Republican-appointed Justices, the sample size became much smaller, and was spread between 7.0 and 7.4 votes per case. When there were seven Republican-appointed Justices, the range became much more diverse, and the mean majority size became bimodal, with the mass of mean majority sizes being between 6.8-7.2 and 7.3-7.4 votes. Finally, when there were eight

Republican-appointed Justices, the mean majority size rose, and was ranged between 7.2 and 7.7 votes per case.

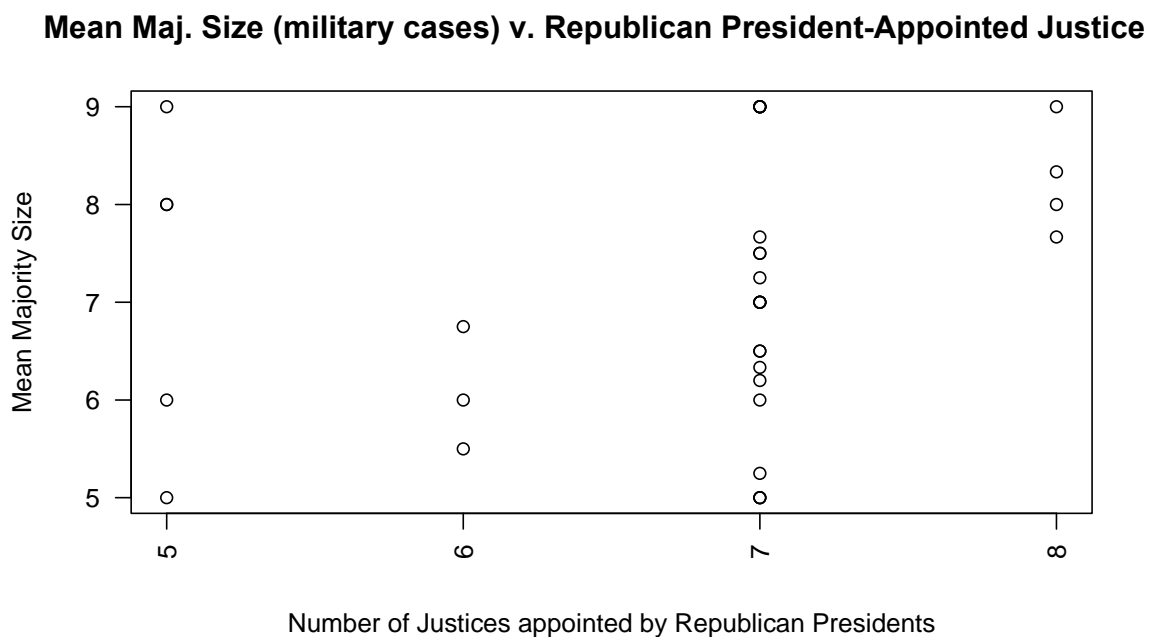
**Figure 9: Mean Majority Size of Military Cases v. Justices Appointed by Republican Presidents, 1973-2014 (with regression)**



In the plot, above, Figure 9, of the mean majority size of military cases against the number of Republican-appointed Justices, there are a number of similarities and differences against the earlier plot of all cases. While the plot shares the methodological constraints as the earlier plot, it also has greater dispersion of the mean majority size groupings. The p-value on the dependent variable of mean majority size of military cases was 0.316, which is not enough to be able to reject the null hypothesis that there is no difference caused by bloc voting on the Supreme Court in military cases. However, there is more to be interpreted from this plot than simply seeking statistical significance in the p-value.

Interestingly, the plot of mean majority size in military cases against the number of Justices appointed by Republican Presidents evidences characteristics that one might expect to see if the hypothesis that conservative realism is reflected in Justices through their appointments. To more clearly examine this, Figure 9 is represented below, without the regression line, as Figure 10.

**Figure 10: Mean Majority Size of Military Cases v. Justices Appointed by Republican Presidents, 1973-2014 (without regression)**



As is evident once the data is plotted out, when there were six justices who were appointed by Republican Presidents, the mean majority size in military cases ran between five and seven votes. In the four years when there were eight justices appointed by Republican Presidents (including 2005, when Justice Alito replaced Justice O'Connor), the mean majority size of cases that involved the military typically fell between eight and nine votes. That is, there appears to be correlation between the number of Justices on the Supreme Court who were appointed by Republican Presidents – and arguably, who

possessed notions of conservative realism – and the actual mean majority sizes in those cases. Given the aforementioned methodological limitations of this model, and the p-value that did not permit rejection of the null hypothesis, an argument that causation is present cannot be substantiated, but simply that the data appears to support a correlation between these factors.

There were two measures that were applied to attempting to understand and/or explain the role of judicial appointment and judicial philosophy in military decisions. The first concerned the party of the President who appointed the Justices that heard the cases. Some, including one of the proponents of the attitudinal model, have argued that the ideology of Presidents nominating Supreme Court Justices may not be necessarily equivalent to the Justice appointed by them (Segal, Timpone, and Howard 2000). In fact, far from constitutional ideology, most recently, diversity has been a focus of judicial appointment (Goldman, Slotnick, and Sciavoni 2011). To that end, and since the party of the nominating President may not be analogous to the judicial ideology of a Justice, such that to sustainably predict decision-making is, to borrow the title of Segal, Timpone, and Howard's article, "Buyer Beware," a new measure had to be created to better test whether judicial appointment and ideology have influence over the mean majority size in Supreme Court cases that involve the military (Segal, Timpone, and Howard 2000).

Revisiting the Martin-Quinn scores from earlier in this Chapter, the mean Martin-Quinn score of the Court were tested against the mean majority size of the Court in all cases, and then, in turn, military cases. Applying that concept to the issue at bar, the Martin-Quinn scores may drive at shedding light on Lindquist's bloc theory and Supreme Court decision-making, and by extension, the question of whether quantitative methods

can determine whether the Supreme Court treats military cases differently from all other cases. Operating from a hypothesis that more conservative justices would be more likely to vote for positions that aligned with conservative realism, and hence, would be, pro-military, every Justice who served on the Supreme Court between 1973 and 2014 was indexed, looking for conservative Martin-Quinn scores. For purposes of this question, separate tests were conducted for all justices who had a term Martin-Quinn score above 0, 1, 2, and 3 (where positive Martin-Quinn scores indicate conservative positions, and larger numbers indicate that a justice is more likely to vote conservatively). For purposes of this analysis, the posterior mean, vice the posterior median, was used, as the mean would be more sensitive to more conservative positions than the median would be. Using the median would cause the result to be more flat, in that large scores would be tempered by whatever the median number was. The mean, on the other hand, would be sensitive to large scores within a term that may influence the score one way or the other.

On the next page is a portion of the chart that was created to visually examine the data to begin to more substantively analyze it. In addition to containing the data from the earlier plot on the number of Justices who were appointed by Republican Presidents, it contains five additional data points. Table 1 represents a partial table of what is wholly reproduced in Appendix A and is included, for reference. In the column immediately to the right of the column identifying the number of Republican appointees on the Court, is the name(s) of those appointees that had a negative Martin-Quinn score for that given term. In other words, it would be more likely than not that on a particular case, those Republican-appointed Justices would vote in line with a liberal position. In some cases, there is a low likelihood (with a Martin-Quinn score between 0 and -1), and in other

cases, the score indicated a profound chance of a liberal decision (with a Martin-Quinn score of -2 and beyond (-3, or -4, for example)). For each column labeled “MQ” and followed by a number (“MQ0”, for example), that represents the number of justices on the Court in that term that had a Martin-Quinn score of at least that value; to wit: zero, one, two, and three, respectively. For instance, in looking at 1973, there were six justices that had a positive Martin-Quinn score; that is, a score that was greater than zero. In that same term, four justices had Martin-Quinn scores that were greater than one, and in turn, two justices had scores that exceeded two, and only one justice had a score that exceeded three. In each subsequent iteration, by definition there will be the same number or less justices who are included in each category as the progression to the far edge of the scale is made.

**Table 1: Abbreviated Appendix A: Justices with Negative Martin-Quinn Scores Examined by Strength of Score**

	President (R) Appointments	Appointments (R) with a negative MQ score	MQ0	MQ1	MQ2	MQ3
1973	6	Brennan	6	4	2	1
1974	6	Brennan	6	4	2	1
1975	7	Brennan	7	2	2	1
1976	7	Brennan, Stevens	6	2	1	1
2012	5	n/a	5	4	2	1
2013	5	n/a	5	3	2	1
2014	5	Kennedy	4	3	2	1

In contradiction with the literature cited for the proposition for this hypothesis of bloc voting, in 38 of the 42 terms examined, there was at least one Republican appointee who had a negative Martin-Quinn score for the given term. Moreover, in twenty terms, there were two Republican-appointed justices who had negative Martin-Quinn scores, and in thirteen terms, there were three such Republican-appointed justices. Only in the 2010-2013 terms were there no Republican-appointed justices that had a negative Martin-Quinn score. In fact, in those four terms, all Democratic-appointed justices had negative Martin-Quinn scores, in addition to all Republican-appointed Justices having positive Martin-Quinn scores, potentially evidencing an attitudinal or bloc voting era in formation.

Should the Martin-Quinn scores bear fruit in examining whether the majority size of military cases is higher than all cases, it could be seen in the number of justices whose Martin-Quinn scores in a particular term are above zero, as there should be larger majorities. As the progression down the line of Martin-Quinn scores occurs, and Martin-Quinn greater than one, two, and three occur, there may appear to be marginalized groups – small groups that are more ideologically conservative – who do not stand for the Court and may be unable to draw a majority of the Court to their opinion. The plots of mean majority size against the number of Justices who have a Martin-Quinn score higher than zero, one, two, and three, respectively, for both all cases and military are depicted in Figures 11 and 12.

**Figure 11: Mean Majority Size of All Cases v. Martin-Quinn Scores, 1973-2014**



**Figure 12: Mean Majority Size of Military Cases v. Martin-Quinn Scores, 1973-2014**





In examining the plots of the means of all and military-only cases against Martin-Quinn scores, at least two hypotheses are confirmed – the greater the Martin-Quinn score, translating as a higher likelihood of casting a conservative vote on a particular case, the fewer justices there were, indicating that there are blocs that form, and the data supports that the mean majority size of military cases was much broader than it was for all cases when examining the number of justices who had Martin-Quinn scores of 2 or higher in a given term.

Somewhat strangely, the mean majority size of military cases when contrasted against the number of justices with a Martin-Quinn score greater than one has statistical significance, evidencing a negative slope and showing significance at the 0.05 level. The negative slope is most interesting in this result, as it tells us that mean majority size of military cases actually decreases when examined against the justices who have a Martin-Quinn score of one or more.

The last item of significance in examining the relationship between mean majority size and Martin-Quinn scores of individual justices is that the range of majority size for all Martin-Quinn scores, but especially when the Martin-Quinn score is greater than zero is much broader as against all cases. This potentially indicates that military cases are more divisive than the community of all cases, causing mean majorities of anywhere from five to nine in any given term. This divisiveness could potentially present itself in military cases, stemming from the problem of categorization. For purposes of this study, these cases have been categorized as being military-related, essentially putting them on the same plain as the twelve issue areas logged by the Supreme Court Database. While there can be inherent overlap between categories, a category of military cases is

especially prone to this problem. That is, what definitionally made a “military case” was first, the presence of a search term that would make it undeniably a military case, and then a substantive scrub of those cases. However, what may present as fulfilling both of those criteria could just as easily present as a number of different types of cases. Using the nomenclature of the Supreme Court Database a “military case” could also be a federalism case, were it to describe mobilizing the Army National Guard, or a civil rights case in the case of an enlisted man suing for racial discrimination aboard a Naval vessel, or a First Amendment case if the case at bar centered on a set of facts that included a protester’s right to protest on a military installation or the right of a person to attach a politically themed bumper sticker to their car, making it a mobile advertisement, and then driving it onto an installation. On each of these issues, one might expect an interesting nexus of thought. The justice that might be pro-federalism may also be pro-First Amendment in the above listed cases. Alternatively, there may be a justice that might be pro-civil rights, but would vote against that particular plaintiff because s/he believes the issue is properly a federalism issue, and assert that the military has the right to enact rules that foster military cohesion and/or good order and discipline.

### Conclusion

The difficulty of examining the question of whether the Supreme Court treats the military differently from its body of all other cases is difficult to operationalize and even tougher to draw conclusions from, for a number of methodological reasons. However, in the forthcoming chapters, this work will set about qualitative and ethnographic analyses that shed more light upon this most fundamental question.

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<sup>1</sup> There is an inherent selection bias, using as this data set only the body of cases that have in fact been decided upon by the Supreme Court. The certiorari process acts as a gatekeeper to what actually reaches the Supreme Court, but I argue that one can reasonably assume, for the purposes of this study, that ideology plays a less prominent role in the cert process than it does in the substantive discussion of the case. The certiorari process decides whether or not a case is salient enough for the Court to consider, and the decision in that matter may or may not be made alongside the same majority-minority line that will later be observed in the Court's actual opinion. Whether or not this theory about ideology in fact holds true would be an interesting avenue to consider for future research, but for the purposes of this portion of the larger work of the dissertation—wanting to assess the mechanisms behind majority coalition-building within the Court—I believe this starting point is justifiable, and I seek to broadly describe and examine circumstances that lead to larger majorities.

<sup>2</sup> The R code that I created and used is available for this, or any other section, is upon request, but not included in the text or in the appendices due to its length.

<sup>3</sup> Attorney cases, as described by the Supreme Court Database fall into four distinct categories – 1) admission to a state or federal bar, disbarment, and attorney discipline (cf. loyalty oath: bar applicants; 2) admission to, or disbarment from, Bar of the U.S. Supreme Court; 3) attorneys' and governmental employees' or officials' fees or compensation or licenses; and 4) commercial speech, attorneys (cf. commercial speech).

## CHAPTER 5

### THE FOUR CIVIL-MILITARY GAPS

Chapter 4 quantitatively examined the question of whether the Supreme Court is involved with the military, and at a secondary level, whether the Court treats the military differently from the other cases it hears and decides on. While the working familiarity with the Court and the sheer number of cases strongly support the proposition that the Court is involved with the military, with eighty cases that meet the most stringent search criteria, and 689 cases touching the military, the question of whether the military is treated differently is harder to answer. Multiple theories were tested, ranging from specialized issue areas to bloc voting theory, and while differences were shown, very few of those differences were at statistical significance such that the null hypothesis, that there were no differences, could be discarded.

Chapters 5 and 6, by comparison, will transition from the quantitative examination of the research question, by way of evaluating the cases by term, using majority size to a qualitative one, examining language in, and characteristics of, the cases. This chapter will introduce the methodology of the qualitative codes, their theoretical bases, and the potential results from the data using these types of coding.

#### Qualitative Methodology

Qualitative research encompasses a great number of research approaches under a broad methodological umbrella. While each of these methods vary in their execution, they all seek to observe and understand behavior. Concerning this research, the attempt

is to better understand the Supreme Court, both collectively and individually, and also its relationship with the military.

Three distinct coding methods were employed to code the data. The first two will be discussed and examined in this chapter, and the third will be examined in Chapter 6. However, before discussing each method, its methodology, and rationale, taking a step back and reframing the data set would be helpful. Each case was scanned for relevance and sorted. Once the non-responsive cases were removed, there were 80 cases in the data set. These cases were decided between November 1973 and April 2014. Each case would thereafter be read in its entirety, and coded for occurrences of predetermined criteria.

Both of the coding methods that were employed at this phase of the project were first-cycle coding methods. First-cycle coding methods are “processes that happen during the initial coding of data” (Saldana 2013: 58). There are seven subcategories of processes that occur during the initial coding of data. Those seven subcategories include grammatical methods, elemental methods, affective methods, library and language methods, exploratory methods, procedural methods, and theming the data. The details of these subcategories will be presented in a moment, but the notion of first-cycle coding methods implicitly imply that there are second-cycle coding methods. Second-cycle coding methods are a more advanced level that require “analytic skills [such] as classifying, prioritizing, integrating, synthesizing, abstracting, conceptualizing, and theory building” (Saldana 2013: 58).

Returning to the first-cycle coding methods, the seven subcategories will be unpacked, in order. Grammatical methods, contrary to the simple read on the name, refer

to the basic grammatical principles of a technique, and not to the grammar of language (Saldana 2013: 69). Elemental coding methods are one of the fundamental approaches to qualitative data analysis in that they permit a review of the body of the data set (Saldana 2013: 83). Affective coding methods examine the qualities of the human experience, such as emotions, values, conflicts, and judgments, by identifying and acknowledging these experiences (Saldana 2013: 105). Literary and language methods use such implements as dramaturgical coding and motif coding to analyze a body of literature or oral communication (Saldana 2013: 123). Exploratory coding methods somewhat self-descriptively explore and preliminarily assign codes to data before more refined coding systems are implemented (Saldana 2013: 141). Procedural methods use preexisting methods such as protocols or taxonomic coding to analyze a set of data (Saldana 2013: 150). Finally, theming the data is a bit of a hybrid between first-cycle and second-cycle, wherein themes that come from a data set are analyzed (Saldana 2013: 175). That is, conclusions from the data are being analyzed, causing this to be a hybrid in terms of cycle.

It is true that “each qualitative study is unique,” and because of that, “the analytical approach will be unique” (Patton 2002: 433). In that spirit, after researching the advantages and disadvantages of these coding methods against factors such as this work’s research question, the nature of the data set, and the goals, of the project, a conclusion was arrived at. Integrated into the case analysis will be two specific coding methods: descriptive coding and magnitude coding.

Descriptive coding is a form of elemental coding (Miles and Huberman 1994; Saldana 2003; Saldana 2013). For the sake of clarity, it is worth noting that this type of

coding has been termed “topic coding” (Wolcott 1994), but to be consistent, this type of coding will continue to be referred to as “descriptive coding.” This type of coding examines and summarizes a short phrase as the basic topic of qualitative data. It is especially important here to clearly examine the data, and to place the phrase, should it appear, in its proper context. That is, merely because a phrase appears in a block of text that is being examined does not mean that the entire piece is about that phrase, or more appropriately, relative to descriptive coding, that the text in question is about the substance of the topic, not an abbreviation of it (Tesch 1990; Saldana 2013).

This technique is useful for examining the generalities of the unit being studied, in this study, Supreme Court cases, rather than the nuances of the people in action (though this will be examined later). This is an ideal form of coding for this project because “bread and butter” categories are created for further analytic work (Saldana 2013: 88). These categories then translate to an inventory of topics, which can be analyzed, examined, and compared, for their own patterns and meanings.

The second method of coding that was performed with the primary data set was magnitude coding, which is a form of grammatical coding (Saldana 2013). Magnitude coding takes an existing data set and adds a supplemental code to indicate “frequency, direction, presence, or evaluative content” (Saldana 2013: 72-73). For example, words that describe intensity might be “strongly,” “moderately,” or “no opinion,” and words that might describe frequency could be “often,” “somewhat,” or “not at all.” Additionally, magnitude codes can consist of numbers as a means to indicate intensity or frequency (Saldana 2013: 73).

Magnitude coding can be applied in both quantitative and qualitative data sets. Along these lines, the application of quantitative methods to qualitative data sets is not without critique. Magnitude coding is, at its core, a means to quantify qualitative data. Saldana offers as an example patient satisfaction scores at a doctor's office, using the values of "1," "2," and "3" to represent "high quality," "satisfactory quality," and "low quality" (Saldana 2013).

### The Four Civil-Military Gaps

With the methodological framework and their respective goals laid out, this next section will set about operationalizing these methods by describing how these methods were applied to the data set of cases.

With descriptive coding, the goal is to broadly examine the content of an item of data. What are the main themes of the data? How do these themes interact? There are a nearly infinite number of ways that cases can be categorized, and there is a temptation to evaluate the cases that meet the evaluative criteria, and study the civil-military gap as it appears in those cases. Such an evaluation may look at a case like *United States v. Johnson*, 481 U.S. 681 (1987), where a Coast Guard helicopter pilot, on a rescue mission, requested radar support from civilian air traffic controllers from the Federal Aviation Administration. After the controllers assumed radar control of the helicopter, it subsequently crashed into a mountain, killing the pilot. The Supreme Court held that the lawsuit was barred, citing *United States v. Feres*, 340 U.S. 135 (1950), which serves as an extension of sovereign immunity, barring servicemembers from collecting damages from the United States Government for injuries sustained in the line of duty.<sup>1</sup> At first



look, *Johnson* presents as a standard case that appears to be the continuation of precedent, that comes from military-specific functions. However, the case presents much more than what is seen in that brief description, speaking of relationships that are “distinctly federal in character,” but also rationale of the death benefits provided to the surviving family member, and the policy rationale for the provision of those benefits.

What does it mean to have wholly different rationale in the same case? While the ending is the same, is there is more than one path to arrive at this conclusion? The authors of a compelling method and study conceptualized the civil-military gap not as a singular gap, but along four primary ideal types – four separate gaps. Scholars have examined this problem through different lenses, but those lenses are divergent enough to be understood as an independent way of evaluating civil-military relations to better understand the civil-military gap (Rahbek-Clemmensen, et al. 2012). While the volume of authors evaluated civil-military relations through particular viewpoints, this, more unified theory attempts to incorporate each one of those viewpoints, strengthening the result and the understanding that comes from it.

Rahbek-Clemmensen and colleagues conceptualize the civil military gap not as a singular entity, but as four distinct separations between the military and the civilian community: a cultural gap, a demographic gap, a policy-preference gap, and an institutional gap. Each of these gaps will be detailed with a case example from the data set highlighting the gap that is being described.

## Cultural Gap

The cultural gap examines the value differences between military and civilian populations. Key variables of the cultural gap examine mutual perceptions, norm socialization processes, and organizational path dependencies. This cultural gap begins in Basic Training. In an apropos acronym, the Army promulgates its culture to new recruits through “LDRSHIP.” The individual letters of LDRSHIP are “L” – “Loyalty,” “D” – “Duty,” “R” – “Respect,” “S” – “Selfless service,” “H” – “Honor,” “I” – “Integrity,” and “P” – “Personal Courage” (Soldier Life 2016). The effect of what that training in military culture creates is evidenced by pieces like that written by Thomas Ricks, where he embedded himself at Marine Corps Basic Training. Over the 11-week basic training period, Ricks observed citizen-volunteers meet a new world in the Marine Corps, get acclimated to that world, have that world displace previous cultural understanding, and then return to society changed as a result of that training (Ricks 1997). Platoon 3086 through its training, evidenced a very aggressive leadership style and intensive training, challenging the recruits at every turn. This training goes beyond physical training and military customs, however. One of the comments heard from the authoritative and influential company commander was “Something I’ve seen as a platoon commander is that the Marines who get in trouble are the ones who hang out with civilians” (Ricks 1997: 206-207). On the morning of graduation, the soon-to-be-minted Marines are so enthused and so intense that in response to a drill instructor query of whether they are all present, the class leader yells “The count on deck is fifty-five rough, tough, can’t-get-enough United States Marine Corps recruits! Sir!” (Ricks 1997: 209). The process of Marine Corps training is so transformative that one of the recruits, after

graduation and his return home, was asked about life at home. He recalled an incident at a New Jersey street fair. He said that people were drinking and fighting, and that there was litter and trash everywhere. People were hostile and disrespectful, and there was no sense of politeness. He tells that his response was “I didn’t let it get to me. I just said, ‘This is the way civilian life is: nasty.’” Referring to civilian rudeness, he says “You don’t want to get down to their level” (Ricks 1997: 231). When describing the ride home, a platoon mate of that Marine described the train ride home as “horrible.” The train was “filled with smoke,” and “people were drinking and their kids were running around aimlessly. You felt like smacking around some people” (Ricks 1997). Finally, another new Marine was asked how it felt to be a member of the armed forces and defending his country, and his response is as clear as it is striking: “Defending my country? Well, it’s not really my country. I may live in America, but the United States is so screwed up” (1997: 236).

The notion of the cultural gap, as evidenced by powerful anecdote through Ricks, can be seen in the case of *United States v. Denedo*, 556 U.S. 904 (2009). In this case, the petitioner, Jacob Denedo, arrived in the United States, after coming from Nigeria, and enlisted in the United States Navy. Subsequent to his enlistment, Mr. Denedo became a lawful permanent resident. In 1998, Mr. Denedo was charged with conspiracy, larceny, and forgery, all of which were crimes under the UCMJ. Through his attorney, Mr. Denedo pled guilty to reduced charges, and he was discharged from the Navy, after appellate affirmation of his conviction, in 2000. In 2006, Department of Homeland Security commenced removal proceedings against Mr. Denedo due to the conviction.

Petitioner Denedo filed a writ of *coram nobis*.<sup>2</sup> This writ comes from the Latin *coram nobis resident*, which translates as “in your presence” (Black’s Law Dictionary 2001). This petition, in essence, asks a court to correct a most fundamental error to achieve justice when no other remedy is available. The writ of *coram nobis* that Petitioner Denedo claimed was for ineffective assistance of counsel, who, per the Petitioner, allegedly assured Petitioner Denedo that his plea bargain would carry no risk of deportation. The military appellate court decided that it had jurisdiction to hear the petition under the All Writs Act, but it denied the petition on the merits. The Court of Appeals for the Armed Forces – the equivalent of the military Supreme Court – concurred with the appellate court. Ultimately, the Supreme Court affirmed the lower court decision, 5-4.

This case, on the facts and procedural posture alone, appears to be merely procedural. At first glance, an appellate court ruled on a procedural issue, and two subsequent courts, including the United States Supreme Court, affirmed that decision. It is because of that simple, procedural appearance that language detailing civil-military relations and the cultural divide is all the more striking. The majority opinion, after asserting its own jurisdiction, addressed the jurisdiction of the military appellate court and the propriety of it hearing writs of *coram nobis*. However, the Court did not conclude that thought and end their opinion. Rather, the Court noted that the result that was reached “is of central importance to for military courts,” and, speaking directly to those same military courts, that the “military justice system relies upon courts that must take all appropriate means.” Going beyond that, the mere articulation is different and arguably superfluous than what would be seen in a non-military case: the notion that

military courts need a special power to manage their own business, obfuscating the need for federal court intervention, immediately forces the question of why such a power is needed.

While the majority opinion ends shortly after this discussion, the very beginning of the dissent presents the answer to this asked question. In dissent, Chief Justice Roberts cites a 1957 plurality opinion in *Reid v. Covert*, 354 U.S. 1, 35-36, writes that “Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view of maintaining obedience and fighting fitness in the ranks.” This is exactly the answer! If the goal of military justice is to be quick, efficient, final, then a decision that empowers the military court of appeal to correct a wrong would enforce those understandings by not dragging out a process and forcing another appeal. Moreover, keeping the issue at a military trial level instead of at the level of the Supreme Court reinforces notions of discipline and control, both of which are prioritized – and even codified into law – in the military.

### Demographic Gap

The second civil-military gap is the demographic gap, which examines whether the military represents the population of the United States in its partisan and socioeconomic makeup. The logic behind this gap is simple, but forceful – with the commencement of the All-Volunteer Force in 1973, the armed forces seemingly moved away from the demographic composition of civilian society, as against periods of time before the All-Volunteer Force, when the draft was used. The demographic gap envisioned here is not limited to one demographic. Age, political affiliation,

socioeconomic status, race, and gender all influence this measure of the civil-military gap.

The change to the All-Volunteer Force (AVF) marked a change in recruitment strategy for the military. Economist Milton Friedman was a strong proponent of the AVF, arguing that a “market-model military” was in line with American notions of freedom and economic efficiency (Tannock 2005). Incentivizing service with financial and non-financial benefits has been commonplace since 1973. These benefits include, but are not limited to bonuses for entry or reenlistment, tax-free housing stipends, and heavily discounted health care. At the creation of these benefits, some wondered if those who were poorer would be more inclined by the benefits, changing the socioeconomic makeup of the military as against the remainder of society, and beyond that, would the racial and ethnic demographic of the military necessarily change if the socioeconomic status of its members changed (Evans 1993).

The President’s Commission on the All-Volunteer Force (“The Gates Commission”) was charged with issuing a comprehensive report on the then-proposed All-Volunteer Force. This report would address recruitment, retention, the reserve military community, and any objections to the AVF. Issuing its report in 1970, the commission members unanimously were in favor of the AVF. Concerning the speculation that the socioeconomic, racial, and ethnic makeup of the military would change, the Gates Commission directly spoke to this several times. Twice in the 214-page report, a “black enlisted force” was referenced. In a chapter labeled “The Debate,” the report directly addressed the question of whether higher pay required for an AVF would be “especially appealing to blacks who have relatively poorer civilian

opportunities” (Gates Commission 1970: 15). Much later in the report, in a chapter labeled “Objections to an All-Volunteer Force,” in a subsection called “An Army of the Black?,” the report echoed the same language as the earlier example, but added the burden of defense that may be suffered by disproportionately represented races and ethnicities (1970: 141-142).

The Gates Commission report offered two concrete statements in response to those prompts. First, that the “[AVF] concluded that the racial composition of the armed forces cannot be fundamentally changed by ending the draft” (1970: 142). More specifically, the report offered manpower ratios at current level and what expected levels might be. The report, using an antiquated reference to African-Americans, stated that current manning levels were at 10.6% of the military, which was slightly less than the proportion in the general population of the nation. The report concludes that African Americans would be 15% of the military and 18% of the Army, specifically, and “the frequently heard claim that a volunteer force will be all black [...] simply has no basis in fact [...] even extreme assumptions would not change the facts drastically” (1970: 15-16).

The Gates Commission predicted that there would be no more than 18% of African-Americans who enlisted in the military, which would be somewhat consistent with the comparative percentage in the whole United States at that time. Unfortunately, this prediction was incorrect. By 1979, the actual percentage of African-Americans in the military was 36.7%. Put another way, the percentage of African-Americans in the military in 1979 was threefold as against the actual percentage in the population.

While the discussion of the demographic gap has thus far revolved around race, it, again, is not limited to that demographic. The key variables for this gap are geographical origins, ethnicity, political affiliation, socioeconomic status, and family background. With regard to political affiliation, the demographic gap manifests itself anecdotally with one author noting that “being Republican is becoming part of the definition of being a military officer” (Rahbek-Clemmensen, et al. 2012: 672 citing Isascoff 1996), with some studies showing that up to 60% of servicemembers identify as Republicans, with only 13% identifying themselves as Democrats (Rahbek-Clemmensen, et al. 2012: 672). Additionally, relative to geography, the military is disproportionately represented by Southern and rural areas. Moreover, with the Clinton-era closing of installations in the northeast and west, this disproportionate representation was exacerbated (Rahbek-Clemmensen, et al. 2012: 672, citing Douquet and Schaeffer 2006).

One of the more timely issues relating to the military mirrors a case that was decided in 1981 on this same point: whether women are required to register under the Selective Service system, and by extension, whether women should be in combat. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), a number of plaintiff men filed lawsuits against the defendant, Selective Service Director, challenging the Military Selective Service Act (MSSA). Under the MSSA, Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. While there is much present discussion about the role of women in combat, and whether women should be required to enroll under MSSA, the net effect of this policy in the 1970s was to have men overrepresented in the military as against their representation in society. A divided Court held:



The different treatment of men and women naval officers reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect for opportunities for professional service. In light of the combat restrictions, women do not have the same opportunities for promotion as men, and therefore, it is not unconstitutional for Congress to distinguish between them. (Rostker 1981:67, quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

In the discussion of the cultural civil-military gap, the Court in *United States v. Denedo* affirmed the take-charge, resolve at the lowest possible level, finality that is mentally conjured when thinking of the military, which strengthened the evidence of the cultural gap. Concerning *Rostker* and the demographic civil-military gap, with its timing, its relevance, and its language, one can make the argument that this case did not affirm the gap, but served as a means for its emergence. With military combat and recruitment policies strengthened, and males being overly represented in the military population, there is certainly a *prima facie* argument that can be made that an aggressive, male-dominated culture became more so through judicial reinforcement.

### Policy-Preference Gap

The third civil-military gap is the policy preference gap, which examines the space between civilian and military elites on a range of public policy issues. This gap presents the greatest opportunity for study of what seems to be the purest definition of civil-military relations, but it also presents the greatest paradox.

In its original understanding, the military was an agent of the President of the United States, and should be subordinate to the civil power (Huntington 1957: 164). But, inherent in a policy-preference gap is that the very agent that was designed to protect the

country, its people, and to serve the President, must itself become powerful enough to threaten those institutions (Rahbek-Clemmensen, et al. 2012: 673). That is, for there to be a legitimate policy difference – a divergence of policy preference – that means something, the institution of the military must have grown powerful enough to be able to first form, and then to articulate a contrary policy preference. The Framers believed that a citizen did not cease to be a citizen when he became a soldier, but they did ensure that the separation of powers was enforced. Article I, Section 6 of the Constitution states “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” This bar ensures that no member of the Congress shall hold office in the Judiciary or the Executive branches, where the Executive branch includes military office (Huntington 1957: 165).

The intentional separation of powers between the Legislature and the military – one of the civilian controllers and the controlled – raises an interesting proposition: whether the legislative branch can suffer from ideological co-opting by the military. This topic will be addressed in depth later, but for now, it serves to highlight that since the inception of the country, there has been a worry about this ideological co-opting.

Returning to the policy-preference gap, this, again, is one of the most interesting aspects of civil-military relations. It is pronounced and perhaps the most visible interaction/difference between the civilian community and military elites. Similar to the previous two types of civil-military gaps, the policy-preference gap has three key variables that help identify it, which include an expressed policy preference by military elites, rational-gain divergences between the civilian community and military elites, and historical and entrenched preferences by military elites.

One of the cases in the data set that provided the best example of the policy-preference gap was *United States v. Smith*, 499 U.S. 160 (1991). In *Smith*, the spouse of a military member gave birth to a baby with massive brain damage. Petitioner Smith asserted that the military physician, who was working at a United States Army Hospital in Italy, was negligent during the delivery and that the brain damage caused by the birth was partially attributable to that negligence.

In accordance with 10 U.S.C. §1089 (hereinafter called the “Gonzalez Act”), the government sought to substitute itself, arguing that when lawsuits were brought against military personnel for torts committed in the scope of their employment, that the Government is the proper party. Moreover, the government, pursuant to the same statute, requested that the suit proceed under the Federal Tort Claims Act, 28 U.S.C. §2680 (hereinafter called “FTCA”). Somewhat predictably, the government’s next argument was that if the case was to proceed under the FTCA, and because the case arose abroad, subsection (k) of the FTCA would apply. Subsection (k) provides that the recovery and claim recognition provisions of the FTCA are barred if the claim arises in a foreign country. As a result, the government argued that the case should be dismissed.

During the pendency of the appeal, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 as an amendment to the FTCA. In response to the Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which, *inter alia*, held that the “judicially created doctrine of official immunity does not provide absolute immunity to Governmental employees for torts committed in the scope of their employment” (*Smith*, 499 U.S. at 163). This ruling and its aftermath provide an opportunity to see the policy-preference gap in action.

While tort reform is a politically charged issue, the debate on it is usually framed in compensation limits, as opposed to standing to sue. That is, debate and discussion tend to focus on the amount of money that a successful plaintiff can recover from a negligent defendant, rather than whether a plaintiff has a justiciable claim of injury against a defendant. There has long been a notion of qualified immunity for government officials acting in the scope of their employment. Tracing its roots back to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), where the Court found that a federal right exists for governmental negligence, but not explicitly discussing whether there could be immunity, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) was the first case to affirm that qualified immunity could – and would – shield governmental officials from liability so long as “their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known” (*Harlow v. Fitzgerald* 1982: 818). This doctrine, as it applies to government officials, continued, relatively unchanged since *Harlow*. While it was clarified in *Saucier v. Katz*, 533 U.S. 194 (2001) and *Pearson v. Callahan*, 555 U.S. 223 (2009), the doctrine of qualified immunity for most types of governmental officials exists largely as it has since 1981. However, the doctrine for all types of federal employees did not remain so consistent.

In *Westfall*, a civilian employee of the federal government worked at a depot in Alabama. He brought a lawsuit in United States District Court against several depot officials for negligently causing or permitting warehousemen to inhale soda ash, which allegedly resulted in chemical burns to his eyes and throat. At the trial level, the District Court granted summary judgment to the defendant officials, and stated that any federal employee was entitled to absolute immunity for ordinary torts committed in the scope of

employment; that is, no liability where there would otherwise be liability. On appeal, the Court of Appeals reversed, holding that the plaintiffs expressed a cause of action that was sufficient to be heard at trial. The United States Supreme Court affirmed the Court of Appeals. In a unanimous decision, the Court held that federal officials were not absolutely immune from state-law tort liability for actions that were within the scope of their employment, that absolute immunity does not attach simply because the conduct of a federal official is not prescribed by law, and therefore requires more than the exercise of minimal discretion, and that the law, as it existed at the time, recognized a material issue of fact, and therefore summary judgment was not applicable.

Congress' response to *Westfall* was swift and decisive. *Westfall* was decided on January 13, 1988, and four months later, on May 17, 1988, HR 4612, the Federal Employees Liability Reform and Tort Compensation Act of 1988 was introduced (Congress.gov 2016). The official title of the act states:

A bill to amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Concerning the decisiveness of the House of Representatives and the Senate, both bodies passed the bill by voice vote. After the House of Representatives agreed, again by voice vote, to the changes by the Senate, the bill was submitted to the President and signed four days later (Congress.gov 2016). The specific findings in the text of the law examine the history of the Federal Tort Claims Act, and note that the weakening of the FTCA will “seriously undermine the morale and well being of Federal employees [and] impede the ability of agencies to carry out their missions” (Public Law 100-694, Sect. 2(a)(6)).

While the military physician in *Smith* delivered the plaintiff's baby in 1987, the case was not decided until 1991. In the interim, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (hereinafter referred to as the "Liability Reform Act") became law. The Government defendants argued that the act of delivering a baby, albeit negligently, was covered in the scope of employment of the military physician, and he – and the government – should be immune from private lawsuit. The Ninth Circuit Court of Appeals reversed the trial court and held that while true that the Liability Reform Act made the FTCA the only proper remedy for employment-related torts committed by Government employees, that is only true if the FTCA provides a remedy. Because §2680(k) bars any remedy in cases arising abroad, the Court rationed that the lawsuit was not barred by the Liability Reform Act.

The Supreme Court accepted the case, and reversed the judgment of the Court of Appeals. In a judgment with eight justices in the majority, the Court held that a person injured overseas by a United States military physician is absolutely precluded from seeking damages from the physician, holding that there is absolutely immunity for Federal Government employees, even when recovery is precluded, due to, for example, a provision like §2680(k), when the claim arises overseas.

On its surface, the decision in this case seems to reinforce *Harlow v. Fitzgerald*, *Saucier v. Katz*, and *Pearson v. Callahan*, but this is deceiving. While the Court's language in those cases was "qualified immunity" and the language in *Smith* was "absolute immunity," the results in those cases – bars on plaintiffs asserting cognizable claims against federal government employees for actions committed in the scope of employment – are identical. However, there is a key distinction between these cases.

While *Harlow*, *Saucier*, and *Pearson* all arise from incidents in the United States, *Smith* arises from an act by a military physician in Italy. Despite the language in §2680(k) that specifically exempts the FTCA as the exclusive remedy if the claim arose in a foreign country, the claim was still fed into the FTCA, with the predictable result of absolute immunity. With the Liability Reform Act, Congress was clear – the intent was to allow missions to be accomplished without worry of lawsuit by private citizens. The Court in *Smith* went out of its way to find, 8-1, that military physicians who serve in foreign countries are exempt from private judgment under the FTCA, specifically reinforcing the notion of military efficiency.

Again, while the merits and benefits of tort reform can be discussed *ad infinitum*, the doctrine in question is separate from that debate. Here, specifically included language in the the Gonzalez Act that permitted the Government to permit lawsuits against individuals acting in the scope of employment to be tried under the FTCA. Under the separately enacted FTCA, the government is given qualified immunity if its agent is acting within the scope of his employment. The Supreme Court subsequently interpreted this standard as virtual absolute immunity, and especially after the Liability Reform Act was passed. However, in reference to the military cases, the FTCA specifically barred application of the statute when claims arise in foreign countries, but the Court strengthened the power of the military through its interpretation. Finding that the malpractice was committed by a military physician in Italy, the Court permitted the government to force the plaintiff to sue under the FTCA and, subsequently, lose by stating the federal government was covered under the FTCA despite the *lex loci delicti* – the site of the wrong – being abroad.

The policy-preference gap is clear. Congress clearly intended one interpretation of the FTCA and the Gonzalez Act: the federal government will receive qualified immunity, but only under certain circumstances. The military interest is also clear, to wit: receive protection under the FTCA wherever the wrong occurred. Here, the differences in the policy objectives pursued by military and civilian elites vary.

### Institutional Gap

The fourth civil-military gap is the institutional gap, which examines the fundamental differences between military and civilian institutions. The key variables that this gap looks at are functional differences, institutional identities, myths, and prejudices. These institutional differences include the media, courts, and the educational system, and may be seen through the increasing presence of Junior Reserve Officer Training Corps or the patriotism of the mainstream media for the post Sept. 11 conflicts (Rahbek-Clemmensen, et al. 2012: 674).

The concept of the institutional gap can be demonstrated through cases in the previous civil-military gap. In the policy-preference gap cases, there are concepts that reflect both the policy-preference gap and the institutional gap. This notion can best be seen in the language of *United States v. Stanley*, 483 U.S. 669 (1987). In that case, which involved the government administering doses of lysergic acid diethylamide (LSD) to a servicemember pursuant to an Army plan to study the drug's effects on humans. The military member claimed that, as a result of the administration of the drug, that he suffered hallucinations, periods of incoherence, and memory loss. The Supreme Court, in rejecting the claim of the plaintiff servicemember, held taken together, the unique



disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers” (Stanley 1987: 679).

While policy-preference is referenced in the quote from *Stanley*, the institutional gap is also evident. However, a clearer example of the institutional gap can be found in *Chappell v. Wallace*, 462 U.S. 296 (1983). In *Chappell*, several enlisted men aboard a ship of the United States Navy sued the ship’s Commanding Officer, four Lieutenants, and three Non-Commissioned Officers. The enlisted men claimed that they received unjust treatment based on race, and that there was a conspiracy to deprive them of statutory rights. Specifically, the men claimed that their direct supervisors, due to the race of the petitioners, discriminated against them in the issuance of duty assignments, the ranking of their performance evaluations, and the meting out of penalties. The District Court dismissed the complaint, holding that the complained-of actions were non-reviewable military decisions, that the petitioner-defendants were entitled to immunity, and that the respondent-plaintiffs had failed to exhaust their administrative remedies. The Court of Appeals reversed, and the Supreme Court granted certiorari.

The Court, in a unanimous decision, dismissed the complaint, holding that enlisted military personnel could not maintain lawsuits to recover damages from their supervisors and superior officers for injuries sustained in the course of military service and as a result of alleged constitutional violations. The Court stated “The special status of the military has required, the Constitution has contemplated, Congress has created, and

this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel” (Chappell 1983: 303-304).

There is a distinct institutional gap that is present – and highlighted – in this case. It is evident from the above quote that the institutions of justice and discipline are necessarily implicated, and are divergent between those civilian institutions and the military institution.

Groucho Marx is given attribution for saying “Military justice is to justice what military music is to music.” Marx meant that justice, per military officials, is very distinct from what civilians might consider justice; the same term has vastly different meanings in the context of whether it is being employed by civilians or military personnel. One of the institutional gaps that Rahbek-Clemmensen, et al. conceived was a gap with courts, and a fair extension of that can be justice. In *Chappell*, one of the key features of the institutional gap, justice, is front and center. By its own language in the opinion, the Supreme Court is recognizing that the military has a unique justice system. What necessitates such a separate and distinct institution, however, is a more complex question that potentially begins to weave the four civil-military gaps together.

The next logical question when stating that an institution is different is asking how it is different. While there are many examples of the gap that separates the civilian justice system from the military justice system, there are three that will be highlighted now. First, the burden of proof for the Government in certain cases is less than the civilian standard. Second, the available punishments for military personnel in certain forums change depending on where the member is stationed. And, third, the authority

that convenes the authority that governs the court-martial is different from the civilian understanding of such authority.

One of the core notions in the civilian criminal justice system is that the burden of proof is held by the Government, and that it is “beyond a reasonable doubt.” Countless lawyers, law students, and collegiate mock trial students have attempted to define this phrase, but it essentially states that the Government must prove, beyond any reasonable doubt each and every element of the crime which they allege occurred. If a juror has reasonable doubt that the crime occurred, or that the defendant committed that crime, that juror must find the defendant not guilty. This is the highest burden in law, and it is a difficult undertaking for the Prosecution in a case to meet this burden. By comparison, in the military criminal justice system, while the burden at court-martial – akin to a criminal trial – is beyond a reasonable doubt, the different services can hold the Government to lesser burdens at different levels of the process. For example, under Article 15 of the Uniform Code of Military Justice, a Commanding Officer can impose punishment on the personnel under their command. This type of punishment is typically referred to as “non-judicial punishment,” and the article leaves it to the respective services to promulgate rules and procedures (10 U.S.C. §815). The Navy and Marine Corps, promulgated such a set of rules and procedures, and in the Judge Advocate General Manual (JAGMAN), In section 110, the rules for non-judicial punishment are promulgated (JAGMAN 0110). Making clear that non-judicial punishment is not a criminal trial, and that a federal conviction does not attach to such a conviction, if any under this article, the burden that the Government has to convict an accused individual is “preponderance of the evidence” (JAGMAN 0110b). While this burden can also be explained similarly, but not verbatim,

by each person who were to explain it, at its core, this standard states that if the juror is 51% convinced that the accused committed a crime, then she is ordered to find that person guilty. While the article states that it is non-judicial, and that no conviction attaches upon a finding of guilt, the initial impression is to infer that it is low-stakes, and therefore, there is little consequence from the proceeding. However, there are implications that affect pay, rank, and future employment that all derive from this proceeding. Returning to the UCMJ, the Commanding Officer, upon a finding of guilt, may impose punishment that can include arrest in quarters for up to thirty days, correctional custody (jail) for up to thirty days, forfeiture of one-half month's pay for three months, and/or reduction to the lowest possible pay grade. In a system that provides increased pay for increased rank, such a reduction in rank can affect finances far beyond the three months that pay can be forfeited, and truly affect a servicemember for years. Most striking, potentially, is that the finding of guilt at the non-judicial proceeding can be used as the basis to initiate separation proceedings to determine whether a person should be retained or fired from military service, and the facts of the underlying conviction can be used to determine characterization of service, which amongst other criteria, determines eligibility for such benefits as the GI Bill. Moreover, in the entire non-judicial punishment process above, while the accused can consult with a lawyer, a lawyer is not present at the hearing to defend the accused.

A second key distinction between the civilian justice system and the military justice system is that the nature and severity of punishments vary based on the duty station of the member. It is difficult to look at a civilian legal system and state that punishments can differ based on where a person is or who their employer is. Certainly,

punishments can be increased based on preexisting aggravating factors, or the nature of a victim, but it is hard to conceive of an example where the employer of a person could affect their legal rights. In the military justice system, such a possibility exists, and can be used with regularity. Returning to the UCMJ, Article 15 states that punishment, under Article 15, can include “confinement on bread and water or diminished rations for not more than three consecutive days” if it is imposed upon an accused who is “attached to or embarked in a vessel” (UCMJ, Art 15b2). There are historical reasons for this that drive at the heart of the culture and ethos of the military, but the institution of justice is markedly different if one is looking at the civilian justice system next to this system that quite literally authorizes bread and water as a punishment upon conviction.

The final example of a key distinction between civilian and military justice systems is striking. When one imagines a defendant standing trial, they likely envision either the defendant hiring a lawyer or having one appointed for him. The defense attorney, in seeking to best represent her client, will likely file a number of motions before the judge, possibly to hire a private investigator, or an expert in a specific field, or to fly a key witness to the trial to testify. The judge, in turn, will rule on these motions, in his capacity as a neutral arbiter. As this exact same scenario plays out in the military justice system, the defense attorney would make the same motions, not to the judge initially, but to the officer who is the same one who convened the court-martial to begin with. Put another way, the official who authorized the process of the court-martial, who began the prosecution of an accused in a court of law, is the same person that must also rule on requests by the Defense. Often times, these requests must be accompanied with reasons for their necessity, putting the Defense in the difficult position of being legally

obligated to advocate for their client, and telling the very authority that authorized prosecution against their client the very reason for their specific request. While it is true that the military judge acts as a fall back position to requests that are denied by the officer who is called the Convening Authority, it does feel like a very different sense of justice than its civilian counterparts.

*Chappell v. Wallace* serves as a shining example of the institutional gap. The divergence of military and civilian legal systems, evidenced by the life of a case (how it is charged and who the Convening Authority is) to the ability of the accused to have legal counsel, to the divergent burdens of proof, to the divergent punishments available all speak to the existence of not only a separate system of justice, but one rooted in different notions of justice and operation.

### Conclusion

We come to the four civil-military gaps throughout this dissertation. Beginning in Chapter 1, with the history of the civil-military gap, it was shown that there are policy differences between the Executive, the Legislature, and the military, and that those preference distinctions alter the behavior of each of these Constitutional bodies and of the military leadership. Continued in Chapter 2, with the ethnographic examination of the military, the intersection between civilian and military structures as it relates to morality and the law is experienced. At the time, it was phrased in legal parlance, the “military deference doctrine,” but now it is seen as both an acknowledgement of the cultural gap and the military mindset of efficiency, separate presence, and morality and a manifestation of an institutional gap as it relates to denials of certiorari, as it relates to

military justice cases appealed from the high military court, the Court of Appeals for the Armed Forces. In Chapter 4, the quantitative aspects of the cases in the data set were examined, but found wanting. It is difficult to see the rope that is the civil-military gap when the strands that comprise it are made of four separate materials. Going forward, using the tools discussed in this chapter, this work will examine the cases that comprise the data set with lenses that examine the four civil-military gaps to critically examine the involvement of the Supreme Court as it relates to them.

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<sup>1</sup> *Feres v. United States*, 340 U.S. 135 (1950), is the case that saw the creation of the *Feres* Doctrine, which holds that the United States Government is not liable under the Federal Tort Claims Act for injuries and damages to servicemembers of the United States for injuries suffered while on active duty and from the negligence of others. *Feres* combined three cases, each with similar histories. The executrix of *Feres* filed a lawsuit against the United States on behalf of her son that died in a barracks fire in Pine Camp, NY. It was alleged that the government should have known of a defective heating plant, which caused the fire, and that there was an inadequate fire watch, both of which led to the death of her son. In *Jefferson*, the plaintiff was required to go under an abdominal operation. Several months later, in the course of another operation, a 30 inch by 18-inch towel marked “Medical Department U.S. Army” was discovered and removed. The plaintiff alleged that the towel was negligently left by the Army. In the third case that was consolidated, the widow of *Griggs* alleged that he received negligent medical treatment from Army surgeons, which was the proximate cause of his death. In each case, each claimant sustained injury on active duty, which was a result of other’s negligent actions. The Court used a three-prong analysis to come to the conclusion that actions by servicemembers against the government in cases where the claimant suffered injury through negligent action could not succeed. The Court first found that the relationship between the Government and the members of the armed forces is “distinctly federal in nature.” Second, the Court found that there were generous statutory “no-fault” compensation schemes in place for injuries to servicemembers. Finally, the Court found that the crux of good order and discipline in the military would be compromised if soldiers could maintain suits for injuries suffered from negligent orders or acts committed in the course of military duty.

<sup>2</sup> This writ is sometimes called a writ of error *coram nobis*. It has the same meaning as the writ of *coram nobis*.



## CHAPTER 6

### WHAT COMPRISES A DOCTRINE?: AN ANALYSIS BY GAP, IDEOLOGY, AND INFLUENCE

#### Methodological Questions

Cultural, demographic, policy-preference, and institutional gaps are defined as the spaces between military and civilian elites, and it has been demonstrated how they manifest themselves in legal cases, but what do they look like on a larger scale? What picture do they paint of the civil-military gap? When they are present in cases, what results are seen? Do they favor the military, or is discourse about civil-military gaps present, but only paid lip service by the Supreme Court? This chapter will examine the cases themselves, attempting to understand what makes the anatomy of the civil-military gap, as viewed through the Supreme Court.

The first question in beginning to look at the cases in the data set was what to code. As detailed in Chapter 5, the natural choice concerning the descriptive coding part of the analysis was to use the four civil-military gaps. While each case presented a slightly different presentation of those gaps, they are largely as described.

The next, pressing question when setting about to code these cases, was deciding what qualified as a code-able passage. As an ancillary, but equally important question, when does a code-able passage cease, such that another passage can be coded, or should the larger passage be coded as one instance of the relevant gap? These questions present sincere issues in coding, especially concerning magnitude coding.

In Chapter 5, it was shown that magnitude coding could be evidenced by attitudinal positions, such as being “strongly” affected by an event, being “moderately”

affected by an event, or having “no opinion” with regard to an event. Similarly, those same positions could be translated into numerical presentation, with values of “3,” “2,” or “1” representing these same attitudinal positions.

With the data set, the intent was to code manifestations of each of the civil-military gaps. But, should the coding note representations, discussions, examples, or footnotes that evidence the gap? And, back to the original question, can they be defined as having a set end period, or once mentioned, does that mean the entire opinion can only be coded as having one manifestation of that gap?

After much thought, it was decided that first, passages can be distinct, such that multiple instances of the same gap could be identified in a particular case. While this added difficulty in coding, it better permits identification of magnitude. Instead of a binary code – either the gap is represented or it is not – the strength of magnitude coding is examining the magnitude of a particular variable. As discussed earlier, concerning certiorari, the Court, collectively, and individually, is a strategic entity. There surely must be a difference between a singular reference of a gap and multiple references to a gap. Performing a binary code would cause the magnitude of strategically placed references to be lost.

The next questions to be decided, once it was determined that multiple references to a gap could be present in the same case, were either how to separate those references, or, alternatively, how to determine that one node has ended.<sup>1</sup> This was more of a challenging question. Writing structure could provide a means of identifying nodes. Should the termination of a paragraph or a section of an opinion be used as a clean, natural break point? While tempting, the hypothesis was that these clean breaks would

artificially multiply or reduce the true number of references. If the measure of nodes beginning and ending were to be paragraph breaks, a node surely could be longer than a paragraph, which would artificially increase the number of nodes present, which would artificially increase its magnitude. If the natural break points were parts or subsections of opinions, again, there would be clean beginning and end points, but in addressing one issue in the case, referencing two or more instances of a gap could be very feasible. Such presentation of multiple gaps in a part or subsection would artificially decrease the number of nodes, thereby decreasing the magnitude of that particular gap in the case. To resolve the question of how to distinguish breaks in the reference to a gap such that another gap could be identified, two primary techniques were used when reading the cases. First, signaling language from the Court itself was used. References to “first,” or “second” indicated breaks that the Court wanted to present to the reader. Alternatively, when the Court did not offer signaling language, the opinions were topically analyzed. When the Court discussed a particular issue that involved the military, the opinion was read through, and if the Court discussed an issue, but evidenced two distinct gaps in that same issue, two nodes were coded. An example of this is present in *Chappell v. Wallace*. Recalling the facts of that case from the discussion of the institutional gap in Chapter 5, several enlisted men wished to sue the Commanding Officer and other leadership of their ship over racial discrimination as evidenced through duty assignments, performance evaluations, and other treatment. One of the first passages in the substantive part of the opinion is:

The "special factors" that bear on the propriety of respondents' Bivens action also formed the basis of this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). There the Court addressed the question "whether the [Federal] Tort Claims Act extends its remedy to one

sustaining 'incident to [military] service' what under other circumstances would be an actionable wrong." *Id.*, at 138. The Court held that, even assuming the Act might be read literally to allow tort actions against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims by a member of the Armed Forces. The Court acknowledged "that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases," *id.*, at 142, the Government would have waived its sovereign immunity under the Act and would be subject to liability. But the *Feres* Court was acutely aware that it was resolving the question of whether soldiers could maintain tort suits against the Government for injuries arising out of their military service. The Court focused on the unique relationship between the Government and military personnel -- noting that no such liability existed before the Federal Tort Claims Act -- and held that Congress did not intend to create such liability. The Court also took note of the various "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services." *Id.*, at 144. As the Court has since recognized, "[in] the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline...' [citations omitted]. Although this case concerns the limitations on the type of nonstatutory damages remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case (Chappell 1983: 298-299).

In the above passage, comprising one paragraph of the Court's opinion in *Chappell*, the Court speaks to two separate policy-preference issues. First, the Federal Tort Claims Act, the act that protects the sovereign immunity of the United States government, and second, the various compensation schemes enacted by Congress to provide for the servicemember if s/he were to be injured or killed. Both of these are distinct policy-preference gaps, with the first making the FTCA the exclusive remedy for any committed wrongs within its scope, and also immunizing the federal government, for *inter alia*, domestic torts (and, despite its clear language, torts committed overseas, as well (Smith 1991). Concerning the compensation schemes, active duty servicemembers receive free medical and dental care, and a death benefit of \$100,000 should they pass away in the line of duty, in

addition to the ability to have \$400,000 of life insurance. Both the FTCA and the compensation schemes present policy-preference gaps. The FTCA was discussed in the policy-preference gap section in Chapter 5. Regarding the various compensation schemes, they create Congressional approval and compensation for insurance that is normally paid for by the private consumer. By comparison, a case found outside the military case data set, is *National Federation of Independent Businesses v. Sebalius*, 567 U.S. \_\_\_, 132 S.Ct. 2566 (2012), which held that the individual mandate of the Affordable Care Act functions as a tax, and is therefore, a valid exercise of Congress' taxing power. *Sebalius* stands, to the private, non-military consumer, as a mandate to either purchase insurance or face a tax for non-compliance, as against a military consumer, who receives that health care for free. The death benefit also strikes as a policy-preference gap, providing \$100,000 in compensation for the life of the deceased servicemember, where no such federal death benefit exists for non-military citizens. Taken together, the quoted passage in *Chappell* was coded as evidencing two separate references of the policy-preference gap node.

After resolving the mechanism by which the magnitude coding was to occur – defining start and end points of the references, there was one more question to address. Could one passage evidence overlapping nodes; that is, two separate nodes in one passage? The intuitive response is that one passage can discuss more than one gap. An example of such a passage can be found in *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980). This case revolved around the dissemination of flyers and other material by Marines on board a Marine station abroad. These flyers, that were mass produced, stated on them that they were addressed to a Member of Congress. The servicemembers were

arrested, and alleged that the regulation barring dissemination was unconstitutional, and/or that the communication was protected speech, since it was a letter to a Member of Congress. Toward the end of that opinion, the Court wrote:

Indeed, both Congress and this Court have determined that "the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." [...] Thus, in construing statutes that affect such matters, we must not limit a commander's authority more than the legislative purpose requires (*Huff* 1980: 458).

This passage presents what appears to be a cultural gap and a policy-preference gap. Examining the rights afforded by the First Amendment to non-military citizens, while there are limitations to free speech, to include defamatory speech (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)), or speech that is likely to incite violence (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), the First Amendment generally protects a broad range of speech, especially within the realm of governmental dissent. Obscenity concerning the draft (*Cohen v. California*, 403 U.S. 15 (1971)) and flag desecration (*Texas v. Johnson*, 491 U.S. 397 (1989)) are both permitted. By contrast, the regulations that apply to servicemembers are ones where their ability to disseminate literature (as a political participant) and where they are permitted to disseminate it are both restricted. Apart from the complicating factor in this case with regard to a regulation not permitting the inhibition of servicemembers in their communication with Members of Congress, the case revolves around the legitimacy of controlling the behavior of servicemembers and the jurisdiction of the land the installation resides on. In the passage above, the Court in *Huff* highlights the different culture in, and importantly, among, the military; that is, "the special character of the military" and the "flexibility in dealing with matters that affect internal discipline and morale." However, there is also a policy-preference gap present in

that there are distinct preferences regarding freedom of speech and freedom of association that the military needs to ensure internal discipline, and an unwillingness to question those needs.

While it may seem obvious that one passage can contain two separate nodes evidencing separate civil-military gaps, there is an opposing consideration that must be evaluated. Are the two nodes that were coded in the same passage different enough so that they are not multicollinear? If the coded nodes were close enough such that they are, in fact, the same node, then splitting them leads to weakened results. While there is no multivariate regression where the multicollinearity would weaken the prediction power, the similarity in variables is a real danger to this examination. Ultimately, can each of the civil-military gaps identified in Chapter 5 stand on their own, possessing distinct criteria not only in name, but also in practice?

It is argued that each of the gaps present possess clearly separate criteria. Without rehashing the discussion from Chapter 5, the description of each civil-military gap – value differences between civilian and military populations, differences in the compositions military and civilian populations, differences in policy objectives pursued by military and civilian elites, and differences between civilian and military institutions, and more importantly, the variables that define them, are distinct. Because the variables can be separated and have clearly distinct descriptions and variables, there can be instances where a singular passage could – and should – be coded as two or more nodes.

## Results and Analysis

The results, and subsequent analysis, can be divided into two parts – the magnitude and movement of the civil-military gap present through the Supreme Court, and the reasons that such a gap might exist. Regarding the presence/movement of a civil-military gap in/through the Supreme Court, the entirety of the data set was examined, broken up in its parts, and viewed through each civil-military gap. Concerning the reasons why such a gap exists, two separate analyses were undertaken that peel back the raw data and examine whether the gap that the Supreme Court perpetuates is a product of other forces exerting influence on it and its members.

### The Supreme Court and the Civil-Military Gap

To refresh the data set, searches were run on all Supreme Court cases between 1973 and 2014 to identify potential data set cases to be studied. From that data set, all responsive cases were read to assess their level of involvement with the military – was there a passing reference, or was there a substantive issue or discussion? From that more substantive review, there were 80 cases that became the body of the data set.

In search of understanding concerning the presence and movement of the civil-military gap through the Supreme Court, what the Court says is vital. This certainly includes the gaps that it references, but also how military cases compare with cases that intersect other constitutionally protected interests, and whether the military is successful in these cases.

Chapter 4 examined the distinct subsets of cases from the Supreme Court Database as testers to verify that military cases could be treated similarly. One of the



issues in that analysis was that “military cases” were hard to define and could represent federalism cases or civil rights cases, for example. It is known, however, that certain types of cases garner certain standards of review. Footnote 4 from *United States v. Carolene Products*, 304 U.S. 144 (1938) is commonly referred to as the “most famous footnote in Constitutional Law,” and it states:

There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [...]

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation [...]

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious [...] or national [...] or racial minorities [...]: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [...] [Italics added] (*Carolene Products* 1938: 152).

This footnote became the grounds for increased standards of scrutiny which the Supreme Court applies, ranging from rational basis (wherein the Government must only articulate that the enactment in question is "rationally related" to a "legitimate" governmental reason offered as its justification) to strict scrutiny (wherein the Government must articulate that the enactment is justified by a compelling governmental interest). While the Courts have never specifically defined how to determine if an interest is compelling, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of multiple

individuals, and not violating explicit constitutional protections. The military receives the lowest form of scrutiny, which exceeds in its lenience the most lenient test that the Supreme Court has articulated to be applied to the Federal Government. But, what happens when the lenient standard of review that the military receives intersects with a more stringent standard that the Court applies to subject matter?

Gender-based classification generally receives heightened scrutiny from the Supreme Court. That is, while the standard of review for gender-based classifications is not as stringent as strict scrutiny, neither is it as lax as rational basis. This intermediate scrutiny first appeared in *Craig v. Boren*, 429 U.S. 190 (1976), which held that statutory or administrative gender-based classifications were subject to an intermediate scrutiny of judicial review. While this case was the first to articulate the intermediate scrutiny standard, it was not the first to wrestle with the problem of the standard of review in gender-based classification cases. One of the more well-known cases in the field is *Frontiero v. Richardson*, 411 U.S. 677 (1973). This case centered around a female Air Force officer challenging a policy that required females to show that their husbands were dependent for purposes of benefits when the males had to make no such showing when adding their spouses. Applying a strict scrutiny standard, the Court eviscerated a specious argument by the Air Force, showing that it was counterintuitive, and the Court, subsequently, overturned the policy. Citing the “long and unfortunate history of sex discrimination,” this case and its standard of review set into motion the standard for gender-based classifications.

Only two years after *Frontiero v. Richardson*, and only one year before *Craig v. Boren*, one of the lesser known gender-based classification cases was decided. The issue

in *Schlesinger v. Ballard*, 419 U.S. 498 (1975) was whether a federal statute that granted female Naval officers four additional years, as against their male counterparts, before mandatory discharge is permissible. The Court, stating that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,” used what appears to be a rational basis test in finding that the Navy-specific gender-based classification was permissible.

There are three compelling meanings concerning the definition and scope of the civil-military gap that can be drawn from the Court’s decisions in these three cases, and specifically, *Schlesinger v. Ballard*. First, it is compelling that the Court did not specify that this statute only applied to Naval officers, and that female officers in different services did not have the same luxury of having four additional years of employment before being mandatorily separated. While this statute was very specific, it discriminated against not only males, but females from other services. Second, *Frontiero v. Richardson* seemingly hinged on rules and regulations concerning pay and benefits, whereas *Schlesinger v. Ballard* hinged on warfighting readiness considerations, evidencing that when the debate is framed on readiness or warfighting, the gap becomes evident. Finally, as mentioned earlier, the scope of the civil-military gap garners additional strength from the fact that only a year later, the Court created a more stringent standard of judicial review. It is understandable if the Court were to trend from the application of strict scrutiny in *Frontiero v. Richardson* to a questioning of that application in a subsequent case, to a new standard of review in a third case. However, here, the Court articulated strict standard in the first case, rational basis in the second case, and the pendulum swung

back to intermediate scrutiny in the third case, providing evidence that the second case was anomalous.

Certainly what the Court says, and even how it interprets its own “rules” concerning standards of review is important, but the question of most interest to many litigants before the Court is whether they won or lost. As a repeat player, it can be presumed that the military cares about the rules that apply to it, but it is logical to believe that they wish to craft policy that results in their victory. The question, then, is whether the military position is favored in these cases? Recalling the discussion of the military deference doctrine, one might expect that the military’s position would be favored in these cases. This hypothesis is supported by research, which holds that with the exception of conscientious objector cases and pay cases, the military tends to win cases with which it is involved (Lichtman 2006). In cases where a direct military position, such as regulation limiting free speech on a military installation, or a governmental position involving the military, such as the draft, is present, determining success for that position is not difficult. As another cue in those cases, the Secretary of a particular armed force, or the Secretary of Defense, or another governmental entity, is usually listed as a party opponent in the case name (for example, *Secretary of the Navy v. Huff*, or *Schlesinger v. Councilman*, 420 U.S. 738 (1975), or *North Dakota et al., v. United States*, 495 U.S. 423 (1990)). However, there are occasions where the named party is not an officeholder or the government advocating a military position. These cases are almost exclusively family law or military rights cases.

In family law cases, the parties are generally married to each other and seeking a divorce, or were married to each other, and are seeking a modification of a support

agreement. Due to special provisions regarding retirement and disability benefits, often times federal policy regarding the military is in direct conflict with inherent state matters, with family law serving as a prime example.

For example, in *Mansell v. Mansell*, 490 U.S. 581 (1989), the husband, a retired servicemember appealed the judgment of the Court of Appeals of California, which held that the portion of military retirement pay that the servicemember waived in order to receive disability benefits was divisible marital property. Eight years earlier, the Court decided *McCarty v. McCarty*, 453 U.S. 210 (1981), ruling that federal law precluded a state court, upon the dissolution of a marriage, from dividing military nondisability pay. In response, Congress, in 1982, enacted the Uniformed Services Former Spouse Protection Act (USFSPA), which authorizes state courts to treat the "disposable retired or retainer pay" of a retired member of the military as property divisible upon divorce (10 U.S.C. §1408(c)(1)).” Ordinarily, state law governs marital dissolution, and after USFSPA, the division of retirement pay is subject to state law. In *Mansell*, the retired servicemember, pursuant to federal law, waived the portion of his retirement pay to receive disability pay. That is, if the retired servicemember were to receive \$1500 retirement pay per month, but would be eligible for \$500 disability per month, he would have to waive an equivalent amount of the retirement to receive the disability payment. A servicemember can only receive disability benefits if s/he becomes disabled as a result of military service, but the benefit to the member, should such an offer be presented, is that the disability benefits are exempt from federal, state, and local taxes (26 U.S.C. §104). In the case of the retiree in *Mansell*, he did waive a portion of his retirement to take his disability, thus reducing his tax liability in the process.

After 23 years of marriage, Major Mansell and his spouse began the process of divorce. The spouse and the retiree entered into a property settlement agreement, which provided that the Maj. Mansell would pay his spouse 50% of his total military retirement pay, including that portion of retirement pay waived so that Maj. Mansell could receive disability benefits. Four years later, Maj. Mansell returned to the Court to modify the divorce decree to exempt the retirement pay that he waived to receive his disability pay. Despite the Supreme Court's admitted reticence to involve itself in a matter that was so predominantly a matter of state law, the Court found for Maj. Mansell, that the waived portion of a military retirement is non-taxable.

The second primary example of a case in the data set where a military official nor the federal government is a named party is a military rights case. While the scope of issues that can be included in this is a fairly broad one, it often presents itself in the data set as a case relating to provisions in the Servicemember's Civil Relief Act (SCRA), the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), or the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The SCRA was discussed in Chapter 3, relating to the methodology of coding Category I and Category II cases, but as a refresher, the Act provides a wide swath of rights to servicemembers, which include a unilateral interest rate deduction to 6% upon showing that the relevant debt was incurred prior to military service and that the military service materially affects the member's ability to pay the debt (50 U.S.C. App. §527) and termination of lease contracts (real estate or automotive, for example) without normal prepayment penalties embedded into standard contracts upon a showing of a military

orders for longer than ninety days more than fifty miles away from the original duty station (50 U.S.C. App §535).

VEVRAA and USERRA are closely related. VEVRAA, in a nutshell, protects veterans from discrimination by federal contractors in hiring and employment. USERRA takes that protection a bit further, and prevents employers from discriminating against employees who are called to the uniformed services and later seek to return to civilian work. USERRA goes beyond VEVRAA because the covered employers are *all* employers, not just federal contractors. The military position in these types of cases is not hard to ascertain, though the government is not a party, either as individual office holder, or in the form of the federal government. A reasonable hypothesis would be that the Government would be interested in protecting the rights of the servicemember, as there are innate policy considerations that are affected. How can the military encourage citizens to join if they are not hired (or re-hired) after their service? Beyond that, with USERRA, how can the military continue to recruit reserve members – members who are eligible to be recalled – if once recalled, and returned, they are fired from their previously held jobs? The Government, in their amicus curiae briefs, echoed these same policy concerns, siding uniformly with servicemembers against their employers.

This presentation of a military rights issue is present in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). The employee, Staub, was a medical technician and a member of the United States Army Reserve, and was employed by the respondent hospital. The supervisor of Staub and the supervisor's supervisor were both hostile to Staub's military obligations. After the supervisors gave a disciplinary warning to Staub, and then reported that he failed to adhere to the corrective action associated with it, the Vice President of

Human Resources reviewed Staub's file and elected to fire him. Claiming that the supervisors fabricated the basis for the disciplinary warning, and therefore, the violation of the corrective action, Staub filed a grievance, under USERRA, which forbids an employer to deny "employment, reemployment, retention in employment, promotion, or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service" (38 U.S.C. §4311(a)). Moreover, liability on behalf of the employer is established "if the person's membership [...] is a motivating factor in the employer's action" (38 U.S.C. §4311(c)). While the Court did find for the petitioner, Staub, holding that if a supervisor performs an act motivated by antimilitary sentiment that is intended to cause an adverse employment action, and if that act is the proximate cause of the ultimately employment action, then the employer is liable under USERRA, the relevant point can be found in the Government's amicus curiae brief.

Prominent in the brief in support of the petitioner is:

In order to encourage civilian service in the uniformed services, USERRA prohibits employment discrimination "on the basis of" military status. 38 U.S.C. 4311(a). Specifically, 38 U.S.C. 4311(c)(1) provides that an employer is liable if an employee establishes that his or her military status was a "motivating factor" in an adverse employment action, and the employer fails to prove that it would have taken that action regardless of the employee's military status. Under USERRA, an employer is liable when a supervisor acting with a discriminatory motive uses the authority that has been delegated to him or her to cause an adverse employment action (Brief for the Government in *Staub v. Proctor Hospital*, 2009 U.S. Briefs 400).

Assuming that the goal of an amicus curiae brief, and one that is written by the Solicitor General, is to persuade the justices on the Supreme Court to the position held by the brief writer, then it should be assumed that the brief should be well-explained, that the position of the brief-writer should be clear, and that there is no incentive to not be forthright about



that position. The Solicitor General will be examined in depth later in this chapter, but for now, it is, therefore, logical to assume that, with that incentive, the position of the United States can be attributed to the actual position, and that a policy goal that is articulated in the brief is an actual policy goal of the federal government.

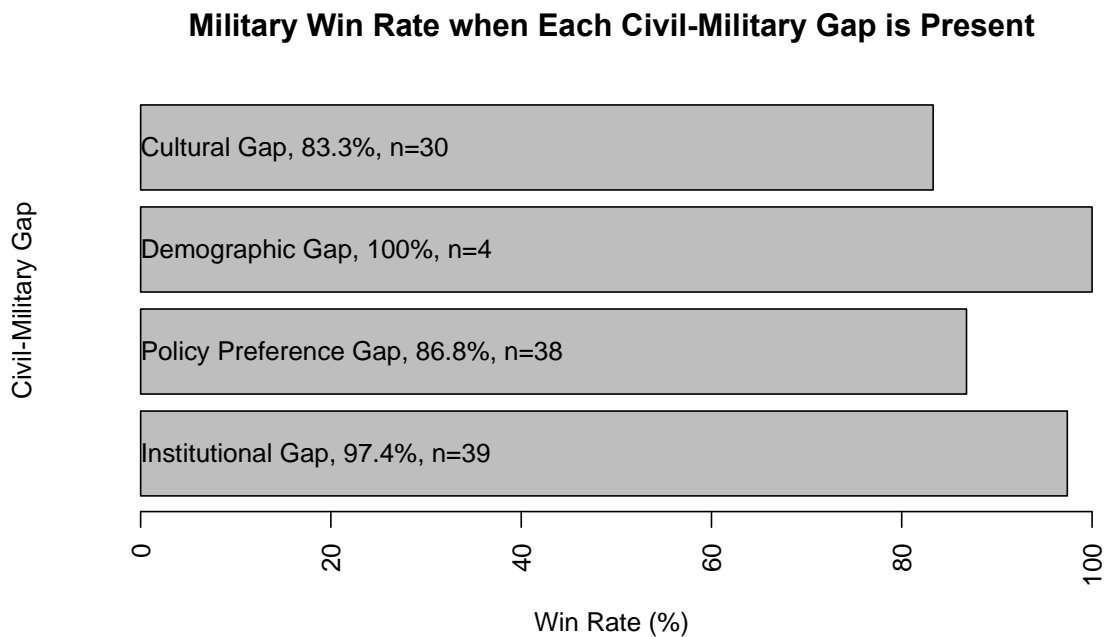
While in both family law cases and military rights cases it is not as easy to discern the position of the military as articulated through the government as when an office holder or a branch of the military is the named party, the ability to ascertain those positions is reliable.

Returning to the question of whether the military position is well-received by the justices, it generally is. Supreme Court decisions had a pro-military position in 63 of 80 cases, or 78.75% (63-17) of all cases studied.<sup>2</sup> This is a little bit higher, but generally in line with previous analysis of military cases from 1918-2004, which found that the military's overall win-loss record was 118-60, or approximately 66.3%. In that same study, it was noted that there were two substantive areas where the military had anomalous results; to wit, conscientious objector cases and military pay cases (Lichtman 2006). In those specific subareas of military cases, the military won 48.9% (16-17) and 38.9% (6-11) of cases, respectively. Excluding these two subtypes of cases, the military win rate was 74.8% (95-32). In the present data set, there are several draft-era cases, but fewer conscientious objector cases since the boundary of the study is at the commencement of the All-Volunteer Force in 1973. As such, there are fewer cases that the military is traditionally likely to lose, which would drive the military win rate higher. Additionally, there are no pay cases in the data set, further bolstering the military win

rate, through subtraction of cases that would traditionally be a loss to a governmental/military position.

The sum of the parts is quite impressive. The military deference doctrine and the studies on the military's win rate are both undeniable. But, with breaking down the civil-military gap into four separate gaps, there is a new opportunity to examine what types of cases, if any are more successful than others. Within the eighty cases examined, all four gaps were observed, and there were 178 references that were coded. Per case, the range of gaps that were observed was zero to four, with the mean being 1.325 gaps (cultural, demographic, policy-preference, or institutional) observed per case. This number is comforting in that it is not on the high side of the range, indicating that there is so much overlap that the distinctions among and between civil-military gaps are irrelevant. However, it is equally comforting that there is *some* overlap, as these gaps can tend to dovetail into each other. Concerning the instances of those nodes, the range of instances was zero to seven, with the mean being 2.225 references per case. What was more striking, however, was the difference in military win rates depending on which gap was observed. Those results are represented in Figure 13.

**Figure 13: Military Win Rate when Each Civil-Military Gap is Present**



The bar plot visually evidences several interesting aspects. Most obviously, the military possesses a high win rate regardless of the type of gap observed. Second, the type of gap seems to matter. The most favorable military win rates occurred in demographic gap cases and institutional gap cases. While the sample size is small in demographic gap cases, that limitation does not exist in institutional gap cases. The Court is deferential to Congress and the military when demographics – differences in the composition of the military and civilian populations – are at issue. Addressing the demographic gap win rate for now, in the data set, these demographic differences included differentiation in the benefits accorded conscientious objectors versus armed soldiers (*Johnson v. Robison*, 415 U.S. 361 (1974)), guaranteed access to life insurance (*Ridgway v. Ridgway*, 454 U.S. 46 (1981)), military reasons that preclude women from serving in combat (*Rostker v. Goldberg*, 453 U.S. 57 (1981)), and statutory authorization

to retain women for additional years against their male counterparts (*Schlesinger v. Ballard*, 419 U.S. 498 (1975)).

The unifying thread between these four cases with demographic gaps seems to be recruiting – the goal of the military to be an attractive option for new and continuing members alike. Being able to provide full benefits for armed service during the draft era, providing life insurance to military members who have an inherently dangerous job, and the retention of female officers by providing them four additional years of employment before separation, if they fail to promote, all provide incentives to new or continued service. We see conscious attention toward recruitment in the report of the President’s Commission on an All-Volunteer Force, noting in their mission that they will explore recruitment incentives and benefits, and dedicating an entire chapter to the subject of recruitment (Gates Commission 1970). The recommendations in that report have been taken seriously, as there has been a proliferation of monetary and nonmonetary incentives to join, or continue, participation with the military. Monetarily, between Fiscal Years 2000 and 2008, the Department of Defense budget for enlistment bonuses increased from \$266 million to \$625 million dollars and the budget for selective reenlistment bonuses increased from \$891 million to \$1.4 billion dollars over the same time period (Asch, et al. 2010). Nonmonetary incentives might include health care, housing, education through the GI Bill, geographical assignment, telecommuting, or deferred pay incentives like retirement accrual or other veteran’s benefits (Coughlin, Gates, and Myung 2013). It logically follows that because of armed conflict during that same span between Fiscal Years 2000 to 2008, recruitment efforts were important, and the same can be argued for the period of time after the Vietnam War. As the Justices do not live in a vacuum, and as

discussed relative to *Korematsu*, are affected by the politics of the day, one can easily imagine the Justices deferring to Congress to set compensation and recruitment schemes.

Equally interesting is the Court's deference when the issue is framed in terms of an institutional gap. 38 of 39 cases coded as having an institutional gap resulted in military wins. Institutional gaps evidence differences between military and civilian institutions. While there were several institutions that were discussed, the most prevalent was the military justice system. This system functions as a specialized, parallel system to federal law and generally only applies to members of the military. While there are many crimes that are nearly duplicated between civilian federal law and the Uniform Code of Military Justice, as Chapter 2 evidenced, the UCMJ has many military-specific crimes that focus on morality or chivalry. It is common to see language such as "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline" (Brown 1990) and:

the Uniform Code of Military Justice cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community [...] Much of the conduct proscribed by the military is not "criminal" conduct in the civilian sense of the word. (Parker 1974: 749).

This language further serves to highlight that while both the UCMJ and civilian legal system are both legal systems, they serve very different purposes. The UCMJ, beyond regulating behavior by proscribing what is illegal, serves as a piece of a much larger program of discipline and honor that is embedded into the deepest undercurrents of the

military. The Court clearly recognizes the separate sphere of discipline which is occupied by the UCMJ and provides it much deference.

Previous research concerning the military win rate evidenced that the military had the worst win rates concerning conscientious objector and pay cases (Lichtman 2006). The military, in each of these types of cases had losing records. Figure 13 evidences that while it is not a losing record, the military tends to lose a significant number of cases that evidence a cultural gap. The cultural gap is described as value differences between civilian and military populations. While winning 80% of the time is not inconsequential, prior to compiling this data, the hypothesis was that this gap would share a similar win rate with demographic or institutional gaps. Certainly, cases that examined the limited public forum of a military base, such as *United States v. Albertini*, 472 U.S. 675 (1985) (holding that a private citizen, once barred from a military installation, can continue to be barred during events that are open to the public, such as open houses), the limited freedom of speech or religion of military members, such as *Brown v. Glines*, 444 U.S. 348 (1980) or *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980) (both discussing the right of the military commander to prohibit distribution of literature by military personnel on base), or *Goldman v. Weinberger*, 475 U.S. 503 (1986) (discussing the right of the military to prohibit the wearing of a yarmulke by a Jewish rabbi in the military) typically resulted well for the military. But, the interest, here, is on the cases *not* won by the military.

The six cases where a cultural gap was identified, but where the military did not win were: *Citizens United v. FEC*, 558 U.S. 310 (2010), *Georgia v. Randolph*, 547 U.S. 103 (2006), *Ryder v. United States*, 515 U.S. 177 (1995), *Shinseki v. Sanders*, 556 U.S.

396 (2009), *United States v. Alvarez*, 132 S. Ct. 2537 (2012), and *United States v. Shearer*, 473 U.S. 52 (1985). *Citizens United* focused on a nonprofit corporation that challenged the constitutionality of a ban on corporate independent expenditures for electioneering communications. In *Randolph*, the defendant challenged a warrantless search of his home, which found cocaine, on the basis that his wife's authorization was invalid after he refused consent to search. The defendant in *Ryder* challenged the composition of the Court of Military Review as violative of the Appointments Clause. *Sanders* consolidated two Veteran's Administration cases to regarding notice errors in respondent claimants' disability benefit proceedings. *Alvarez* held that the Stolen Valor Act was unconstitutional. The administratrix in *Shearer* challenged a summary judgment finding that her lawsuit was barred by the Federal Tort Claims Act. What, if anything do these six cases where the military lost have in common?

After some examination, two patterns emerged. First, in line with previous research, one hypothesis why the military lost conscientious objector cases and pay cases is that these two types of cases have clear rules to follow on the part of the government. In conscientious objector cases, there were set, defined guidelines for local boards to follow to authorize conscientious objector status for the draftee. In pay cases, anyone – military or not – can find out, to the penny, how much money any given servicemember should receive. There are publicly available pay charts that, once someone knows the rank of the servicemember and how many years they have been in the military, will tell you how much money they make. Figure 14 is taken from the Defense Finance and Accounting Service, the pay branch of the Department of Defense, showing the ease of ascertaining monthly pay for any given servicemember.

**Figure 14: Military Pay Chart (Active Duty), effective January 1, 2016**

BASIC PAY—EFFECTIVE JANUARY 1, 2016										
	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16
O-10										
O-9										
O-8	9,946.20	10,272.00	10,488.30	10,548.60	10,818.60	11,269.20	11,373.90	11,802.00	11,924.70	12,293.40
O-7	8,264.40	8,648.40	8,826.00	8,967.30	9,222.90	9,475.80	9,767.70	10,059.00	10,351.20	11,269.20
O-6	6,267.00	6,885.30	7,337.10	7,337.10	7,365.00	7,680.90	7,722.30	7,722.30	8,161.20	8,937.00
O-5	5,224.50	5,885.70	6,292.80	6,369.60	6,624.00	6,776.10	7,110.30	7,356.00	7,673.10	8,158.50
O-4	4,507.80	5,218.20	5,566.50	5,643.90	5,967.00	6,313.80	6,745.80	7,081.50	7,314.90	7,449.30
O-3	3,963.60	4,492.80	4,849.20	5,287.20	5,540.70	5,818.80	5,998.20	6,293.70	6,448.20	6,448.20
O-2	3,424.50	3,900.30	4,491.90	4,643.70	4,739.40	4,739.40	4,739.40	4,739.40	4,739.40	4,739.40
O-1	2,972.40	3,093.90	3,740.10	3,740.10	3,740.10	3,740.10	3,740.10	3,740.10	3,740.10	3,740.10
E-9				5,287.20	5,540.70	5,818.80	5,998.20	6,293.70	6,543.30	6,686.70
E-8				4,643.70	4,739.40	4,890.30	5,145.00	5,341.80	5,488.50	5,488.50
E-7				3,740.10	3,993.60	4,141.50	4,292.40	4,440.60	4,643.70	4,643.70
E-6										
E-5	4,095.90	4,406.10	4,532.40	4,656.90	4,871.10	5,083.20	5,298.00	5,620.80	5,904.00	6,173.40
E-4	3,740.40	3,896.40	4,056.30	4,108.80	4,276.20	4,605.90	4,949.10	5,110.80	5,297.70	5,490.30
E-3	3,309.90	3,622.80	3,719.40	3,785.40	4,000.20	4,333.80	4,499.10	4,661.70	4,860.90	5,016.30
E-2	2,905.50	3,218.10	3,302.10	3,479.70	3,690.00	3,999.60	4,144.20	4,346.10	4,545.00	4,701.60
E-1							4,948.80	5,060.70	5,202.30	5,368.20
							4,230.00	4,341.00	4,473.90	4,618.20
	2,816.10	3,073.50	3,191.40	3,347.10	3,468.90	3,678.00	3,795.60	4,004.70	4,178.70	4,297.50
	2,435.70	2,680.20	2,798.40	2,913.60	3,033.60	3,303.30	3,408.60	3,612.30	3,674.40	3,719.70
	2,231.40	2,381.40	2,496.60	2,614.20	2,797.80	2,989.80	3,147.60	3,166.20	3,166.20	3,166.20
	2,046.00	2,150.40	2,267.10	2,382.00	2,483.40	2,483.40	2,483.40	2,483.40	2,483.40	2,483.40
	1,847.10	1,963.20	2,082.00	2,082.00	2,082.00	2,082.00	2,082.00	2,082.00	2,082.00	2,082.00
	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50	1,756.50
	1566.90									

- Notes:**
- Basic pay for an O-7 to O-10 is limited by Level II of the Executive Schedule which is \$15,125.10. Basic pay for O-6 and below is limited by Level V of the Executive Schedule in effect during 2016, which is \$12,516.60.
  - While serving as Chairman, Joint Chief of Staff/Vice Chairman, Joint Chief of Staff, Chief of Navy Operations, Commandant of the Marine Corps, Army/Air Force Chief of Staff, Chief of the National Guard Bureau Commander of a unified or specified combatant command, basic pay is \$21,147.30. (See note 1 above).
  - Applicable to O-1 to O-3 with at least 4 years and 1 day of active duty or more than 1460 points as a warrant and/or enlisted member. See Department of Defense Financial Management Regulations for more detailed explanation on who is eligible for this special basic pay rate.
  - For the Master Chief Petty Officer of the Navy, Chief Master Sergeant of the AF, Sergeant Major of the Army or Marine Corps or Senior Enlisted Advisor of the JCS, basic pay is \$7,997.10. Combat Zone Tax Exclusion for O-1 and above is based on this basic pay rate plus Hostile Fire Pay/Imminent Danger Pay which is \$225.00.
  - Applicable to E-1 with 4 months or more of active duty. Basic pay for an E-1 with less than 4 months of active duty is \$1,449.00.
  - Basic pay rate for Academy Cadets/Midshipmen and ROTC members/applicants is \$1,040.70.

In both conscientious objector and pay cases, there is nothing overtly “military” about them. Guidelines in determining the authenticity of a conscientious objector’s claim or the rank of the servicemember and the amount of service in the military to determine the proper amount of pay are straightforward and uncomplicated. The same can be true for cases like *Ryder v. United States* and *Shinseki v. Sanders*. Statutory interpretation of the Appointments Clause and determining adherence by the Veteran’s Administration on it’s own rules and policies are in lanes that the Supreme Court traditionally occupies and seemingly do not enter the military sphere spoken of by multiple cases.

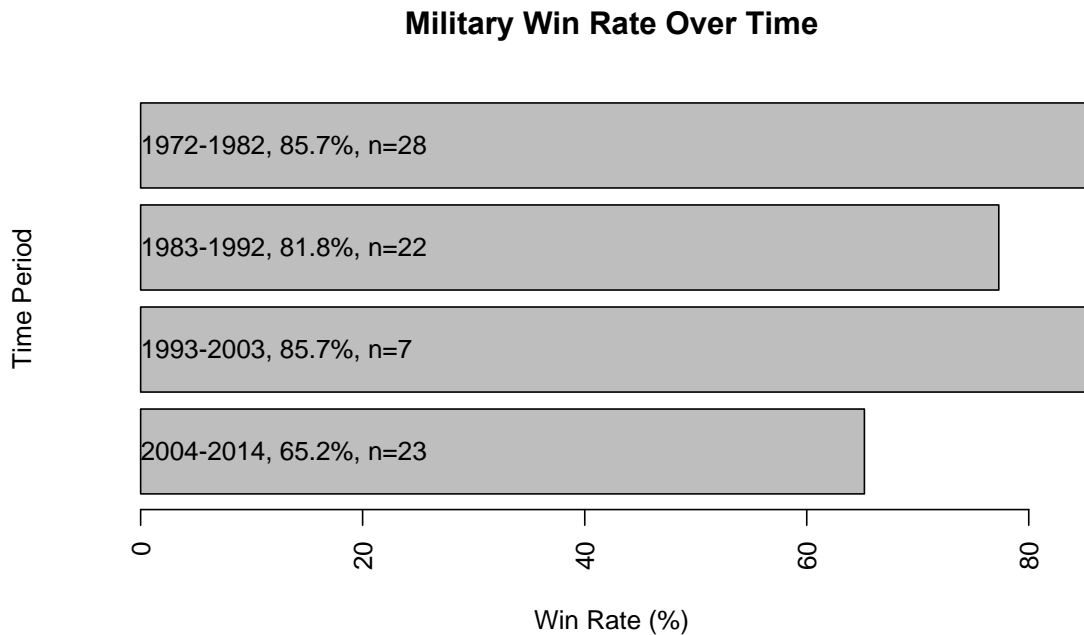
The second pattern that emerged did so when looking at the cases over time. The data set, which was examined over 42 years, revealed 30 cases that had cultural gaps described. When chronologically examined, it became apparent that the frequency of cases coded as having cultural gaps, as well as the frequency of military success in those



cases has changed over time. The 42-year period was examined, and broken it up into four periods, 1973-1982, 1983-1992, 1993-2003, and 2003-2014. These periods were chosen because they presented relatively even periods of time for analysis. Between 1973 and 1982, nine cases were coded as having cultural gaps, and each of these cases resulted in a military win. From 1983 to 1992, there were ten cases coded as having cultural gaps, with the military winning eight, and losing two. In the first 20 years of this 42-year examination, the military won 89.5% (17/19) of cases coded as having cultural gaps. In the last two periods, the frequency of the cases decreased somewhat, but the success rate of the military dropped significantly. From 1993-2003, the Court decided only three cases that were coded as having a cultural gap, and the military won two of them and lost one. In the final period, 2004-2014, the Court, decided eight cases, that were coded as having a cultural gap, but the military won only half of those cases, winning four, and losing the other four. By comparison to the first 20 years of this examination, in the last 22 years, the military won only 54.5% (6/11) of cases coded as having a cultural gap.

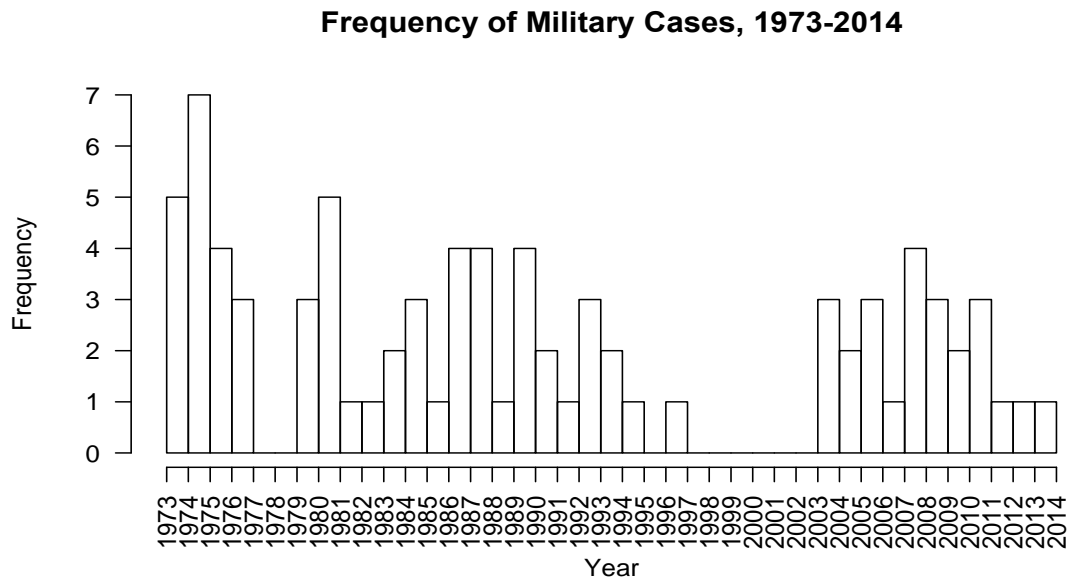
The discovery of the precipitous decline of military win rates in cultural gap cases prompted the logical question of what could have caused it, and the equally logical expansion of the examination to the data set. From what was observed relative to the overall win rate, a similar trend was discovered as occurring with the cultural gap. The results of that ancillary examination are depicted in Figure 15.

**Figure 15: Military Win Rate Over Time**



These results prompted an expansion of the initial question to what could have caused such a decline in all cases, vice solely cultural gap cases. With the exception of the 1993-2003 time period, which only had seven cases decided in it, thus making it difficult to draw defensible conclusions, the military win rate declined from 85.7% to 65.2% over the course of a generation, with each of these respective periods having over 20 cases as data points. While the time periods were chosen to create similar periods of time across all four periods, it is important to note that from 1998 to 2003, there were no cases that were in the data set, meaning that while the chosen periods were chosen out of convenience, there is also somewhat of a natural break that they played into, meaning that the 2004-2014 period is a true reflection of a sea-change that seemingly occurred. Figure 16 contains a histogram of the case distribution per annum.

**Figure 16: Frequency of Military Cases, 1973-2014**



As evidenced by Figures 15 and 16, the cases from 2004-2014 were both chronologically and ideologically distinct from those that took place before 2004.

The obvious event that occurred between 1997 and 2004 were the events on September 11, 2001. Somewhat appropriately, given that focusing event, the first cases, chronologically, in the last period of time were *Rumsfeld v. Padilla* 542 U.S. 426 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Padilla* dealt with whether the Secretary of Defense was the legal custodian of a designated combatant. In *Rasul*, petitioner aliens filed various actions challenging the legality of their detention at the Guantanamo Bay Naval Base. In *Hamdi*, the Court examined the question of whether the Government can indefinitely hold a designated “enemy combatant” without providing an opportunity to challenge that detention. While the Court told Padilla that he must refile his lawsuit since the Secretary of Defense is not the legal custodian of a detainee, the Court lost the other two cases decided in this cluster. The Court held that the Government cannot indefinitely hold a designated enemy

combatant without an opportunity to challenge the detention and that civilian courts have jurisdiction to hear challenges to detention of suspected terrorists at Guantanamo Bay.

September 11, 2001 (9/11) recrystallized a discussion of civil-military relations, both renewing it from the initial examination, and reforming it as new players and happenings advanced and caveated existing theories and caused new ones to be created. While the focus of this dissertation is not civil-military relations post-9/11, it is worth noting that this conversation is present. Scholarly work has begun to re-ask the question of what degree of military influence is appropriate in a given society and what is the appropriate role of the military in that society. Beyond that, however, foundational questions such as whether military service should be obligatory, how to retain servicemembers, how the composition of the military reflects on society, and societal and institutional responses to an increasingly complex geopolitical situation, all further the conversation of what civil-military relations look like in the modern day (Owens 2011).

One of the primary goals of this work is to introduce the Supreme Court as an actor in civil-military relations. To that end, the Court's post-Vietnam deference and its post-9/11 curtailing of that deference, both across all of the civil-military gaps, and specifically the cultural gap are significant and evidence the Court, beyond intuitive understanding, as an actor in the field with meaningful actions. While the rulings are important, it is certainly not the end of the analysis. Individual justices write the opinions, and while the examination thus far has been on the Court, in its entirety, the Justices, their backgrounds, and the opinions themselves merit examination.

## Examining the Nature of the Gap

This section will undertake examination of the nature of the civil-military gap through the Supreme Court, in two different ways. The first will examine the individual Justices and their role in joining and crafting decisions. The second will examine the Government, and specifically, the Solicitor General, and the deference garnered by that office.

The composition of the justices on the Supreme Court can certainly affect the outcomes in cases. As seen by and through the Martin-Quinn scores, a Justice's likelihood to vote a certain way can be predicted, and by extension, by compiling all nine scores together, the likelihood of the Court to rule a particular way on a case can be predicted, as well. It is similarly well-settled that the experiences of justices can, and do, affect their understanding of law. This is not to suggest that justices merely take their experiences and notions of law and blindly apply them to a case, but rather, that Justice's experiences are a component of who they are, and how they perceive the world.

Alternatively put:

There is no naïve assumption that justices in deciding cases are completely free to vote their own preferences or that a voting record necessarily mirrors a justice's inner convictions. On the other hand, there is no assumption, which would be even more naïve, that a Supreme Court justice merely "looks up the law" on a subject and applies it to the case in hand [...] [T]he rules and the traditions of the Court supply institutional preferences with which his own preferences must compete [...] He has free choice, but among limited alternatives and only after he has satisfied himself that he has met the obligations of consistency and respect for settled principles which his responsibility to the Court imposes upon him (Pritchett 1954: 166-168).

It has been argued that career officers have taken over the leadership of military and paramilitary institutions, such as the Department of Defense, the National Security

Council, and the intelligence community, all of which are departments and institutions traditionally responsible for military oversight. Prior to 1980, the Department of Defense (DoD) was significantly non-military, with only 17% of officials having five years or more of military service. After 1980, nearly 25% of the DoD had fifteen years of service, and 44% had five years' military experience. Likewise, the National Security Council, from its creation in 1947 until President Reagan's appointment of Marine Colonel Robert "Bud" McFarlane, and subsequently, Vice Admiral John Poindexter, had civilian leadership at the position of National Security Advisor (Ackerman 2010: 56-58). Such experience colors perspective, making it more likely that the individual with military experience will process information more quickly, and that those with military experience may have different views than their civilian counterparts.

In a similar examination to the observations of military presence in civilian elite positions, research was also conducted to see whether a higher percentage of legislators with military experience would translate to a lower probability that the United States would initiate a military dispute. That study found concerning results, as it relates to the policy-preference gap. While it is true that the probability that the United States would initiate a military dispute decreases with a higher proportion of legislators who have prior military experience, another truth about legislators that have prior military experience is that they hold views on military involvement that accord more closely with those of military leaders than those civilian leaders who have no military experience at all (Gelpi and Feaver 2005). While legislators with prior military experience tend to think more along military lines, there have been a decreasing number of Congresspersons who have

military experience, and some have offered that this is one of the causes for a widening civil-military gap (Mazur 2002).

In seeking to better understand the civil-military gap and the military through the lens of the Supreme Court, examining the Court and its ideological involvement with the military could present an interesting opportunity. Is the Court's support for military positions independent of ideological assimilation from the military itself? In this interrelated, but distinct research question, one of the first issues to face was how to operationalize this question. How can, or should, the Court be studied to shed light on whether there is ideological co-opting?

Recalling the cultural gap and the Marines that Thomas Ricks followed in boot camp, the military, and specifically, boot camp, presents a fundamental shift in thinking, behavior, and action. It was reasoned that there was no better experience than that which is acquired firsthand, and as a result, the measures that were used to examine ideological co-opting were the personal histories and experiences of the justices.

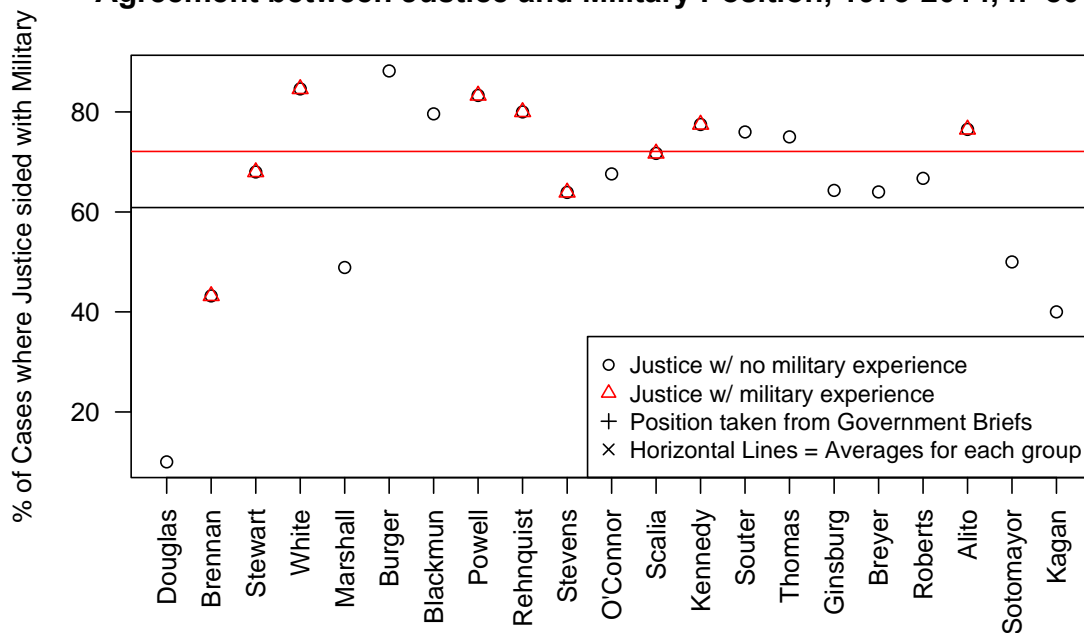
The first step to this question was to ascertain whether any justices were exposed to the military mindset. Determining the answer to this question required the use of loose criteria, since exposure does not necessarily equate to length or level of service. During the years of this study, there were 21 Justices that sat on the Court. After reviewing biographies of the justices, it was determined that nine of the justices had qualifying military experience. In alphabetical order, those justices were J. Alito (Army Reserve, 1972-1980), J. Brennan (Army, 1942-1945), J. Kennedy (California National Guard, 1961), J. Powell (Army Air Force, 1942-1945), J. Rehnquist (Army Air Force, 1942-

1945), J. Scalia (Jesuit military high school, 1950-1953), J. Stevens (Navy, 1941-1945),<sup>3</sup> J. Stewart (Navy, 1942-1945), and J. White (Navy, 1942-1945).

After ascertaining the justices with military experience, each of the 80 cases in the data set were examined, and it was noted which justices were sitting on the Court for each case, and as a subset, which justices agreed with the military position in a given case. Simply put, if the case was a win for the military, then justices in the majority were counted as siding with the military position. If the military lost a case, then a justice was counted as siding with the military position if their dissent aligned with the military position. Each justice's percent of cases where they sided with the military position was plotted against the averaged agreement rates of the justices with military experience against the justices that had no military experience. The results, listed in the order that the Justice was confirmed, are depicted in Figure 17.



**Figure 17: Percent of Cases Where Justice Sided With Military Position, 1973-2014**  
**Agreement between Justice and Military Position, 1973-2014, n=80 (+)**



Two thoughts are apparent when examining Figure 17. First, generally, justices that had been exposed to the military, either through education, or service (which was generally during wartime) were more aligned with the position espoused by the military. A two-sample t-test, was conducted to determine if the group of justices with military experience were statistically significant from the group of justices with no military experience. Yielding a p-value of 0.07443, there is relative certainty that the null hypothesis, that the means of each respective group are equal, can be rejected, and that what is intuitive by visual examination, has statistical confirmation, that is, that the agreement of the group of justices with military experience to military positions is greater than that of non-military justices adopting pro-military positions.

The second thought is that the presence of justices on the Court that have military experience was once more prominent than it currently is. Owing to World War II, multiple justices took an active part in the military prior to their judicial service. At

present, there are only two justices on the Court with military experience, J. Alito and J. Kennedy. This trend becomes especially interesting when paired with the decline of military-favored positions from 2004-2014, and certainly provides some context to it. Recalling the body of literature that examined the ideological assimilation of the Executive branch agencies and positions like the Department of Defense and the National Security Advisor, and the Legislative branch, it is logical to extend that argument to the Judiciary.

Furthering the analysis of individual justices and their ideological influences, the majority opinion writer for each case in the data set was recorded. It is common knowledge that the senior justice in the majority has the privilege of assigning the Justice who has the responsibility of writing the majority opinion, unless the Chief Justice is in the majority, in which case, the privilege of assignment goes to the Chief Justice. It is similarly settled that justices have narrowly tailored issue specializations (such as right to counsel, versus the whole gamut of civil liberties), or, alternatively put, subject matter expertise, such that they are likely to write the majority opinion on their particular issue of expertise, should they be in the majority (Brenner 1984; Brenner and Spaeth 1986). Beyond that, it has been shown that the opinion determines the value of the decision itself, but also the acceptability of the decision to the public (Danelski 1960).

As a means of exploring whether military experience tended to translate into that narrow band of issue specialization, such that there may be an assigned majority opinion writer for military cases, were that justice to be in the majority, the majority opinion writer in each of the 80 cases in the data set was examined. Given the number of cases in the data set and the number of justices that sat on the bench during the period of the

study, a particular justice should expect to write four majority opinions, were they to be distributed evenly. In practice, J. Rehnquist led all other justices with twelve opinions written. There are two thoughts that emerge from this discovery. First, the effect of J. Rehnquist goes beyond his authorship of majority opinions. In total, J. Rehnquist sat on the bench for 60 of the 80 cases that were coded, with 50 of those cases resulting in positive outcomes for the military, and with J. Rehnquist siding with the military 48 times. Significant beyond the volume of cases where J. Rehnquist wrote the majority opinion were the cases that J. Rehnquist authored. Some of the most well-known cases involving the military deference doctrine, and some of the cases that exhibited the most coded gaps in the data set had their majority opinion written by J. Rehnquist. These cases include *Parker v. Levy*, 417 U.S. 733 (1974), *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Goldman v. Weinberger*, 475 U.S. 503 (1986), all discussed *infra* as prototypical examples of civil-military gaps in action. So significant is his impact from the bench on civil-military relations, that some have speculated that it was J. Rehnquist that won the Vietnam War through his pen and philosophy of deference to the military (Mazur 2002).

The second thought that emerges from J. Rehnquist writing the majority opinion in so many cases is more of a historical note. It is a matter of record that, J. Rehnquist was initially appointed to the Supreme Court by President Nixon in 1972 and ascended to be the Chief Justice by appointment of President Reagan in 1986. It is worth noting that there is a well-developed body of literature on the politics of the Supreme Court and the separate role of the Chief Justice being an institutional agent, as opposed to Associate Justices who have less formalized institutional responsibility (Murphy 1964; Danelski 1960; Slotnick 1979). It is possible that being the Chief Justice, C.J. Rehnquist had

incentive to be in the majority to control the decisions of the Court, and that he would give himself authorship over the majority opinion. While this examination is not central to the examination at bar, the data does not, at first glance, appear to support that contention. During his nearly 20-year tenure as Chief Justice, there were 27 military cases decided, and C.J. Rehnquist wrote five majority opinions, contrasted with the nearly 14 years of service as an Associate Justice where 35 cases were decided and J. Rehnquist authored seven majority opinions. Across both time periods, the percentage of cases where the majority opinion was written by initially Justice, and eventually, Chief Justice, Rehnquist remained fairly constant.

In addition to an analysis of the justices that hear and decide cases, the briefs that they receive to both assist and influence them to rule in favor of a party's or group's interest were examined. While the idea of the influence of briefs seem very different than a justice's background in the military, they are addressing the same question of ideological assimilation, in the former case, assimilation through their military experience, and in the latter case, assimilation to the governmental/military position by its prestigious advocate, are addressed.

The United States Solicitor General works within the Department of Justice, and is the appointed representative by the President of the United States to represent the federal government before the United States Supreme Court.<sup>4</sup> The Solicitor General and, by extension, the office, has a favorable reputation, with Justice Brennan noting that some of the "ablest advocates in the U.S. are advocates in the Solicitor General's Office" (O'Connor and Epstein 1983). Beyond legal acumen, it is generally understood that the Solicitor General has influence in, and within, the Court, so much so that the office

holder is often referred to as the “Tenth Justice” (Caplan 1987; Caldeira and Wright 1988). This influence and respect comes from two primary sources, being an agent of the Court, and being a repeat player (Bailey, Kamoie, and Maltzman 2005).

The Solicitor General possesses an institutional responsibility that extends further than zealous advocacy on behalf of the United States. This institutional responsibility includes providing legal information to the Court, with a knowledge of what their powers and constraints are, providing recommendations to the Court on whether it should grant certiorari to a particular case,<sup>5</sup> and the unique position that the Solicitor General plays as being part of the Executive branch, but not seen as lashed to politics (Bailey, Kamoie, and Maltzman 2005).

Closely tied to the unique institutional responsibility that the Solicitor General has to be candid with the Court through argument and advice, is that the Solicitor General is a repeat player. The notion of the repeat player has been well studied (Galanter 1974; Segal 1988; Caldeira and Wright 1988; Springs and Wahlbeck 1997; McGuire 1998), and can be distilled to the notion that those with experience before the Court, do better; that is, they are more successful. Whether it is in the form of catchwords that the Solicitor General knows when and where to place in a brief to sway justices to be sympathetic to their legal argument (Perry 1991) or, relating to the point of being an agent to the Court, that trust becomes a commodity through the number of interactions that the justices have with the Solicitor General. There is value to having experience; to knowing not only the formal rules and leveraging them to your advantage as an advocate, but also knowing the informal rules and knowing how to leverage them to work in your favor.

The notions that the Solicitor General's prestige, reputation, and experience translate into success has been well-tested (Segal 1988; Caldeira and Wright 1988; George and Epstein 1992). Concerning amicus briefs, research has found that if the Solicitor General filed a brief supporting the state, the odds of the Court concurring approach 61%, whereas without such support, the probability of state success was 44% (George and Epstein 1992). In a separate study, when the Solicitor General supported respondents, the probability of State success was nearly 60%, as compared to only 33% without the Solicitor General's support. In that same study, the likelihood of success for petitioners when the Solicitor General supported the petition was even higher, at 84%. From that same study, it was noted that the success of the Solicitor General was not dependent on the issue that was litigated, but that across all issues, the Solicitor General experienced spectacular success (Segal 1988).

Based on the significant amount of research to support the position of the influence of the Solicitor General, it became important to examine the degree of influence possessed by the Solicitor General within the confines of the subset of military cases studied in this work. There is an old lawyer's adage that asks the question of what you should say if a judge, in her opinion, plagiarizes your brief. The simple and snarky reply: "Thank you." Surely, the likelihood of one winning when the judge is in such agreement with your position that she uses your language verbatim is great. Given the established influence of the Solicitor General, the expectation is that Supreme Court opinions will be deferential to those briefs, and will mirror the language of briefs filed by the Solicitor General on behalf of the United States.

To investigate the degree that justices incorporate language from Solicitor General briefs into their majority opinions, the texts of Supreme Court majority opinions and briefs filed by the Solicitor General for all cases in the data set, where these briefs existed, were collected. Each majority opinion and Solicitor General brief was downloaded from Lexis-Nexus, and the data set includes 54 cases with 73 briefs. Within those 54 cases, 19 of them had instances where the Solicitor General filed an initial brief and a reply brief. In every case where a reply brief was filed, only the original brief was used. This is because the goal of the examination is to capture the extent of which the justices, in their opinions, reflect the verbiage of the Solicitor General. The benefit of looking at only the original brief is that it is filed simultaneously with opposition briefs, or party briefs, if it is an *amicus curiae*, whereas a reply brief is filed after a party has the opportunity to read and react to the opposing party's briefs. The initial brief is what the Solicitor General wants to say, but the reply brief can easily borrow language from the opposition brief to respond to it, muddying any textual analysis of duplicity, artificially increasing such results when the true linguistic similarity is due to the opposition brief.

To calculate linguistic similarity, WCopyfind 4.1.5 (Bloomfield 2016) was employed, as this software permits comparison of documents, side by side. Whereas more widely known plagiarism software (such as Turnitin) compares language in a sample to language in a database of resources – and issues a report on the similarity of the sample document to each individual database document. WCopyfind permits the uploading of two documents, in a closed universe setting, and a comparison of those two documents – and nothing else. While this software was originally created to investigate plagiarism by college students, it has successfully been used across disciplines and issue

areas, to include agenda setting in the Senate (Grimmer 2010), and relevant to the discussion at bar, the content of Supreme Court opinions (Collins, Corley, and Hamner 2015; Collins, Corley, and Hamner 2014; Black and Owens 2012; Corley 2008; Corley, Collins, and Calvin 2011).

To increase the ability of this work to speak to other works in this emerging field, and to remain methodologically sound, WCopyfind's settings were programmed largely based on its recommended (default) parameters, which is its established standard in the literature (Collins, Corley, and Hamner 2015; Collins, Corley, and Hamner 2014; Corley 2008; Corley, Collins, and Calvin 2011). The shortest phrase match was set at six words. This causes the program to ignore matches of five words or less, eliminating phrases such as "This Court previously held that," consequently causing more fidelity in the phrases that are captured. The program was further set to ignore letter, case, numbers, and outer punctuation, which enables the program to find matches despite minor editing. For example, throughout the document, Lexis-Nexus includes page numbers for the various reporters as if it were a real book. An example of this can be found in nearly every case, with the below provided as an example:

[\*743] This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again [\*\*\*451] by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies [\*\*2556] to fight or be ready to fight wars should the occasion arise." (Parker 417 U.S. 733, 743).

Here, the "[\*743]", "[\*\*\*451]", and "[\*\*2556]" indicate the three reporters that Lexis is paginating to, as well as the placement in those reporters of this material. The first pagination, with only one asterisk, references the United States Reporter and the page

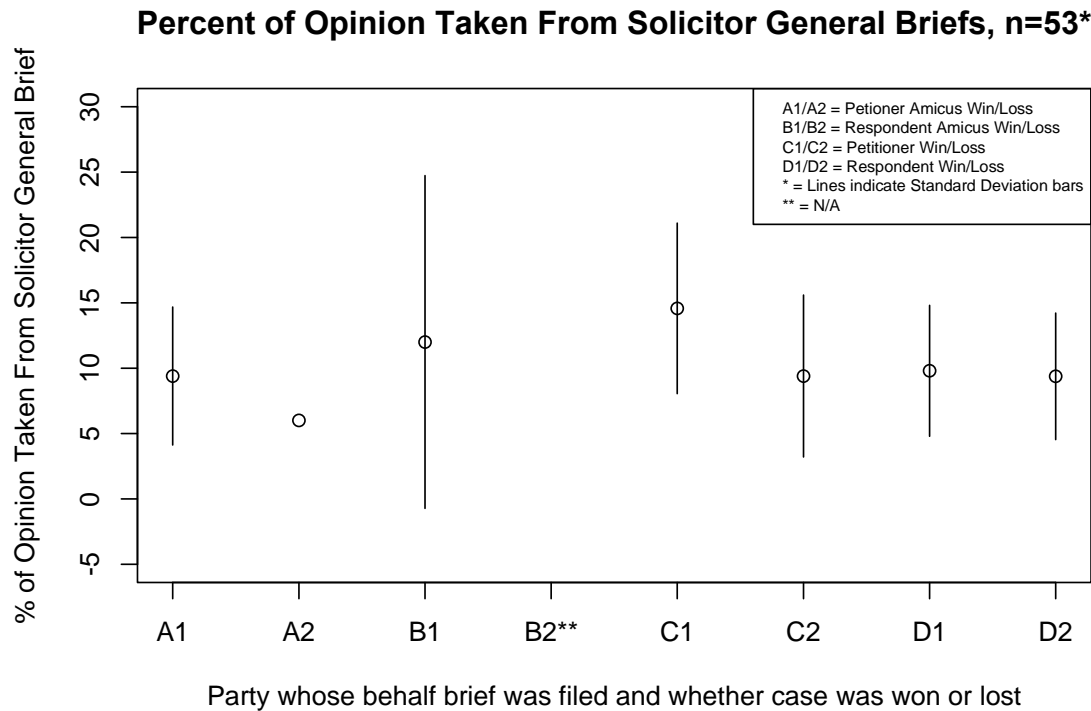


where this material can be found. Similarly, the reporters indicated by the two and three asterisks are the Supreme Court Reporter and the Lawyer's Edition Reporter, respectively. Instructing the program to not ignore such items as page numbers would artificially decrease any results. Additionally, the program was set to skip non-words (words that contain characters other than letters), which similarly addresses fidelity, ensuring that there is no artificial decrease in results due to a case citation. The program was also set to its recommended settings of only capturing strings that were 100 characters or greater and allowing the minimum percentage of matches that a phrase can contain to be 80 percent, in order to allow the program to identify matches notwithstanding minor editing. There is room for forgiveness, however, as WCopyfind was programmed to allow up to two imperfections, permitting the software to bridge itself across two non-matching words en route to an otherwise perfectly matched sentence.

Once the two documents for which comparison is sought for are uploaded, and the program is set to the user's specifications, the program returns a document that indicates, amongst other information, the percentage of one document that is present in the other. For the purposes of this inquiry, the relevant examination is the percentage of the brief that is found in the opinion. Once the program returned its results, the cases were then broken down in to the role of the Solicitor General – whether s/he filed an *amicus curiae* brief for the Petitioner or the Respondent, or whether s/he filed a brief on behalf of the United States in its capacity as the Petitioner or the Respondent in a case, and further broken down into whether the Court ruled for the government/military position. Each of these results, were then sorted and analyzed, assessing the mean of each group, as well as

the standard deviation. The results are depicted in Figure 18, with the circles representing the mean and the lines representing the standard deviation.

**Figure 18: Percent of Supreme Court Opinion Taken From Solicitor General Briefs**



From Figure 18, it is evident that the Court, when the Solicitor General was filing an amicus curiae brief, either for the Petitioner or the Respondent, was more likely to directly use language from the brief when ruling on behalf of the party and position that the Solicitor General supported. Where the Solicitor General was filing an amicus curiae brief on behalf of the Petitioner, the opinion used similar language 9.4% of the time, and when the Solicitor General filed on behalf of another respondent, the opinion contained 12% of the language from the Solicitor General's Brief. Concerning the linguistic similarity when the United States is the Petitioner, the Court is more inclined to use the language from the Solicitor General's Brief, with the Court using, on average, 14.6% of the Solicitor General's Brief when ruling for the United States. Finally, when the United

States is the Respondent, the Court, in its opinion, uses, on average, 9.8% of the language from the Solicitor General's Brief. Concerning the United States as Petitioner and Respondent, however, the interesting aspect is that the linguistic use is consistent both when the United States wins and loses. While there is a significant difference in percent used when the United States is the Petitioner, and much less difference when the United States is the Respondent, the standard deviations for each are nearly identical.

These figures seem to support previous research on the influence of the Solicitor General, and serve to advance it. Given the lower sample size present in the data set due to its limited scope, it is tough to extrapolate these results. However, the results closely mirror Corley's work evidencing that 12.3% of the Court's opinion will come from the Solicitor General's Brief, and is certainly higher than the predicted percentage from party (non-Solicitor General) briefs of 9.8% (2008) reinforcing the influence of the Solicitor General. However, while the notion of the Solicitor General's influence has been confirmed, it is not unique to this subset of cases, and because the sought after measure is ideological co-opting, similarity across series and types of cases is not sufficient to establish such co-opting.

### Conclusion

In this chapter, the veracity of the belief that "[t]he different character of the military community and of the military mission requires a different application" (Parker 1974) was tested. Through examining whether the military is recognized as a unique entity by the Supreme Court, thereby justifying deferential treatment by the Court, and the reasons that would cause the justices to be so

deferential to governmental and military positions over the past 40 years, it is evident that the relationship between the military and the Supreme Court is complex, and dynamic.

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<sup>1</sup> I used Nvivo as the means to organize the case opinions and the references to the individual civil-military gaps. References to a “node” draw from Nvivo using that nomenclature.

<sup>2</sup> In similar style to Professor Lichtman, Appendix B is a list of each case in the data set, the question of issue at bar, the disposition of that case, and whether that case represents a military win (Lichtman 2006).

<sup>3</sup> The implication from these Justices serving in War II is that they were drafted or entered the military after the war officially began. As an interesting aside, J. Stevens enlisted on December 6, 1941, one day before the attack on Pearl Harbor.

<sup>4</sup> It is important to note, given the discussion of ideological assimilation, that the Solicitor General, while the representative of the Executive, and therefore, the military, in lawsuits that involve the military is not/was not necessarily a member of the military. Out of the eighteen Solicitors General – acting and confirmed – since 1973, only two appear to have served, and none since Wade McCree, whose term ended in 1981.

<sup>5</sup> This procedure is known as a “Call for the Views of the Solicitor General.”

## CHAPTER 7

### CONCLUSION

The civil-military gap as examined through the lens of the Supreme Court, is present and well-defined. In conceptualizing the civil-military gap, however, it is better described as four gaps, vice one, because each gap speaks to a different separation between the civilian and military communities. Through each of these conceptualizations – the cultural gap, the demographic gap, the policy-preference gap, and the institutional gap – there is defined space between the Court and the government/military, which manifests itself as a high degree of deference. This deference is both unprecedented in its degree, being more deferential to the government than rational basis analysis, and when viewed in light of the four civil-military gaps, its scope. Military culture permeates the everyday lives of its members, to the degree of setting physical training expectations, requiring certain hair styles, and setting the hours of work. Only when the question at bar is a question of statutory entitlement, with little or no discretion in the application of a rule, has the Court applied scrutiny. Beyond these narrow lanes of cases, the Court is deferential in nearly all other aspects of military life and culture.

Beyond seeing that there are clear indicia that the Court treats the military differently from other cases that it decides, the more compelling question is why it does so. Throughout the period of study, the Supreme Court collectively, and the Justices individually, acknowledged that the military is different. The individual justices provided the jumping off point to the question of why the Court treats the military differently. Addressing the classic question of “Who governs?” (Dahl 1961), the

question that was examined was whether the justices, individually, or the Court, as an entity, are co-opted by external forces, and, due to that co-opting, widely deferential.

This analysis of ideological assimilation proved most interesting, as it both provided answers to the question of why the Court is deferential, but also insight to the future of the Court as it relates to the military. The Solicitor General, who normally experiences great success before the Court, has language used from his Briefs as a matter of course by the justices in their majority opinions. Regardless of whether the United States is a party to the case, or if the brief is being filed on behalf of another party as an *amicus curiae*, the Solicitor General's words find themselves echoed in majority opinions in military cases at a rate that is on par with the set of all other cases. While there is no discernible difference between the usage of language from Solicitor General briefs between military cases and all other cases, there is a difference when it comes to the experience of the individual justices. Cases decided by justices who had military experience were visually and statistically different than their counterparts who have no military experience. Opinions written by justices with military experience were more deferential and resulted in more success for the governmental/military position. A deeper examination of this showed the number of justices on the Supreme Court with military experience is declining, and with it, the rate of military success is also slowly decreasing. While the Court continues to have confidence imbued into it to be the authority on constitutional matters, this, notionally, presents a direct, albeit subconscious challenge, to the legitimacy of the Court. Compounding the academic and lay perception that the Court decides cases attitudinally, is that Justices with military experience are

ideologically co-opted, further diminishing notions that the Court is independent and legitimate (Brigham 1987).

Since 2004, while the military is still advantaged against its opposition, its advantage is less pronounced. Beginning with *Rumsfeld v. Padilla* (2004), *Rasul v. Bush* (2004), and *Hamdi v. Rumsfeld* (2004), there has been a shift in the military win rate, specifically in cases evidencing the cultural gap, but generally true in military cases after that point. From 2004-2014, the military lost as many cases as it did in the nearly 30-year period from 1975-2003. Beyond the win rate, however, there has been a seismic shift in the past few years relative to one of the Court's most sacrosanct doctrines, the *Feres* doctrine.

Throughout this work, the effects of *Feres v. United States*, 340 U.S. 135 (1950) have been materially felt. While this case was not in the data set due to when it was decided, its fingerprints are found throughout many cases in this set. *Feres* is unique in its application, striking in its apparent consistency to subsequent opinions, permeating and salient in its understanding by military legal practitioners, and as close as possible to being sacrosanct. Since its decision in 1950, the *Feres* doctrine has been nearly unprecedented in how it has been treated and understood by legal professionals. While the Federal Tort Claims Act subjects the United States to liability from all persons, that liability is exempted under certain exceptions. Since it was decided, *Feres* has stood as precedent that is inflexible and all-consuming. “[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service” (Feres 1950: 161). Many cases discussed as



evidencing civil-military gaps draw their language and ideology from this seemingly reified case.

While *Feres* has stood strong, it has not been without criticism from academics and practitioners alike (Wells 1993; Wiltberger 2011). However, until very recently, this criticism has been largely contained within newspaper articles and anecdote (Tritten 2011).

On the other hand, two cases in 2013 that rose to the Supreme Court evidenced a high water mark of Supreme Court-recognized dissent and distinction from *Feres*. The first, a case that explicitly decided that a statute permitting lawsuits against the United States under the FTCA be the exclusive remedy for injuries resulting from medical malpractice, and the second, a denial of a writ of certiorari which contained a dissent, explicitly questioning *Feres* and stating that it should be reexamined.

In 2011, Steven Levin sued his military physician and the United States for medical malpractice and medical battery asserting that prior to an operation at the Naval Hospital in Guam, he revoked consent (*Levin v. United States*, 133 S. Ct. 1224 (2013)). The United States substituted itself for the physician and claimed under the FTCA's intentional tort exception and *Feres* that it had sovereign immunity and that the lawsuit should be dismissed. The lower courts agreed with the position of the United States and the Supreme Court granted certiorari.

The Supreme Court, in answering the questions of the case, decided the case unanimously. The Court found that "in no uncertain terms, that the intentional tort exception to the FTCA [...] shall not apply [...]" In the end accounting, *Levin* now

stands for the proposition that a lawsuit against the United States that alleged medical battery by an active duty doctor is permitted.

The Supreme Court's move towards permitting lawsuits alleging medical battery in *Levin* is deeply significant by itself. It is the first decision in decades to implicitly question the *Feres* doctrine. While the holding was more subtle than outright challenge, two points are worth noting. First, the decision was unanimous, and therefore carries significance for that fact (Benjamin and Desmarais 2012). Second, while the decision relied on statutory construction and statutes that became law post-*Feres*, the notion of moving away from *Feres*, if not explicitly stated, was profound. However, this move from *Feres* in *Levin* becomes especially significant when viewed in light of another case from the 2012-2013 term of court.

United States Coast Guard Fireman's Apprentice Eric Lanus returned home from a night in Key West, where he was assigned, and turned on the stove in the kitchen, preparing to cook, before he went to his bedroom and apparently fell asleep. According to the Brief of the Petitioner around 5am, heat from the stove that was left on ignited a fire that engulfed the apartment where Fireman Apprentice Lanus was staying. The fire was eventually extinguished and Lanus was found dead in his bedroom. Petitioner Linda Lanus, acting as personal representative of Fireman Apprentice Lanus, sued the United States under the FTCA, and asked the Supreme Court to overrule its line of decisions beginning with *Feres*, and continuing through cases like *United States v. Johnson* and *Stencel Aero Engineering Corp. v. United States*. While certiorari was not granted in the case, thus removing any precedential value that the case might hold, and causing it not to

be included in the data set examined in this work, a dissent from the denial of certiorari was filed (*Lanus v. United States*, 133 S. Ct. 2731 (cert denied) (2013)).

Justice Thomas, who wrote the dissent, noted that the FTCA contains a number of exceptions to the waiver of immunity, but that “none generally precludes FTCA suits brought by servicemen.” While the dissent stops short of definitively stating what J. Thomas’ position on the case would be, it does notably state “Private reliance interests on a decision that *precludes* [emphasis in original] tort recoveries by military personnel are nonexistent, and I see no other reason why the Court should hesitate to bring its interpretation of the FTCA in line with the plain meaning of the statute.”

*Levin* and *Lanus* potentially stand as the vanguard of a series of cases to challenge what was once sacrosanct legal doctrine. Through the analysis in this work, it is evident that the opinions and doctrine of the Court are intrinsically linked to subject matter (what issue is being described, and what gap is in play), timing, the composition of the Court, and documents meant to influence the Court. These two cases, specifically, and the past decade, generally, potentially offer insight to the future of the law as it relates to military action and policy.

Recalling the Introduction, a large or small civil-military gap, short of the extremes of complete ideological co-opting or a coup, is not a normative goal. Similarly, a widening or narrowing gap is not, by itself, a normative end. Rather, a gap that is widening or narrowing is informative and indicative of the factors that cause it. What was once the Court’s widely deferential policy toward the governmental/military position is narrowing. Justices are becoming more hands on, and far less accepting of the military as a separate sphere, entitled to different rules. Going forward, the Court needs to be

considered as a separate actor, and examined relative to its co-equal branches of government in an attempt to understand the relationship of civilian society to the military.

## APPENDICES

## APPENDIX A

### JUSTICES WITH NEGATIVE MARTIN-QUINN SCORES EXAMINED BY STRENGTH OF SCORE

	President (R) Appointments	Appointments (R) with a negative MQ score	MQ0	MQ1	MQ2	MQ3
1973	6	Brennan	6	4	2	1
1974	6	Brennan	6	4	2	1
1975	7	Brennan	7	2	2	1
1976	7	Brennan, Stevens	6	2	1	1
1977	7	Brennan, Stevens	5	2	1	1
1978	7	Brennan, Stevens	5	2	1	1
1979	7	Blackmun, Brennan, Stevens	5	2	1	1
1980	7	Blackmun, Brennan, Stevens	5	2	1	1
1981	7	Blackmun, Brennan, Stevens	5	3	1	1
1982	7	Blackmun, Brennan, Stevens	5	3	1	1
1983	7	Blackmun, Brennan, Stevens	5	3	1	1
1984	7	Blackmun, Brennan, Stevens	5	3	1	1
1985	7	Blackmun, Brennan, Stevens	5	4	2	1
1986	7	Blackmun, Brennan, Stevens	5	4	1	1
1987	7	Blackmun, Brennan, Stevens	5	4	1	0
1988	7	Blackmun, Brennan, Stevens	5	5	1	0
1989	7	Blackmun, Brennan, Stevens	5	4	1	0
1990	7	Blackmun, Stevens	6	4	2	0
1991	8	Blackmun, Stevens	7	3	2	0
1992	8	Blackmun, Stevens	7	3	2	0
1993	8	Blackmun, Souter, Stevens	5	3	2	1
1994	7	Souter, Stevens	5	3	2	1
1995	7	Souter, Stevens	5	3	2	1
1996	7	Souter, Stevens	5	3	2	2
1997	7	Souter, Stevens	5	3	2	2
1998	7	Souter, Stevens	5	3	2	2
1999	7	Souter, Stevens	5	3	2	2
2000	7	Souter, Stevens	5	3	2	2
2001	7	Souter, Stevens	5	3	2	2
2002	7	Souter, Stevens	5	3	2	2

2003	7	Souter, Stevens	5	3	2	1
2004	7	Souter, Stevens	5	3	2	1
2005	8*	O'Connor, Souter, Stevens	5	4	2	1
2006	7	Souter, Stevens	5	4	2	1
2007	7	Souter, Stevens	5	4	2	1
2008	7	Souter, Stevens	5	4	2	1
2009	6	Stevens	5	4	2	1
2010	5	n/a	5	4	3	1
2011	5	n/a	5	4	3	1
2012	5	n/a	5	4	2	1
2013	5	n/a	5	3	2	1
2014	5	Kennedy	4	3	2	1

## APPENDIX B

### MILITARY CASES DECIDED BY THE SUPREME COURT, 1973-2014

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?*
<i>Musser v. United States</i> , 414 U.S. 31 (1973)	Are induction orders invalid if the local board refused to reopen the file of a registrant claiming conscientious objector status after orders were issued?	No	WIN
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	Can the government provide different veteran's benefits to conscientious objectors who perform alternative service?	Yes	WIN
<i>Cass v. United States</i> , 417 U.S. 31 (1974)	Can the military deny readjustment pay to a reservist who serves six months less than the five years required for such pay?	Yes	WIN
<i>Parker v. Levy</i> , 417 U.S. 733 (1974)	Are military disciplinary regulations vague or overbroad, thus preventing court-martial of disobedient personnel?	No	WIN
<i>Secretary of the Navy v. Averch</i> , 418 U.S. 676 (1974)	Is a rule against service personnel publishing disloyal statements adversely affecting troops unconstitutionally vague?	No	WIN
<i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1974)	Can the military use different criteria for promotion based on a candidate's gender?	Yes	WIN
<i>United States v. Jenkins</i> , 420 U.S. 358 (1975)	Does double jeopardy apply in a case for failure to report for draft induction when the indictment was dismissed?	Yes	LOSS
<i>Foster v. Dravo Corp.</i> , 420 U.S. 92 (1975)	Is an employee, who left for two years to serve in the military, entitled to full vacation benefits for the period of the military leave of absence?	No	LOSS
<i>United States v. Larionoff</i> , 431 U.S. 864 (1978)	Is an agreement to receive an incentive bonus valid at the time it was made, versus the start of the new enlistment period?	Yes	LOSS
<i>Serfass v. United</i>	Does jeopardy attach to a	No	WIN



<i>States</i> , 420 U.S. 377 (1975)	defendant on a failure to report for induction if a jury trial was not waived?		
<i>Schlesinger v. Councilman</i> , 420 U.S. 738 (1975)	Is an Army officer entitled to an injunction for marijuana possession since offense is not “service-related”?	No	WIN
<i>McLucas v. DeChamplain</i> , 421 U.S. 21 (1975)	Is a serviceman entitled to civilian review of an injunction against court-martial when the decision backing injunction was reversed?	No	WIN
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	Can the military bar political candidates or their supporters from portions of a military base that allows civilians access?	Yes	WIN
<i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	Does the right to counsel apply in summary courts-martial?	No	WIN
<i>Kelley v. Johnson</i> , 425 U.S. 238 (1976)	Are regulations governing hair for police officers a valid exercise of authority?	Yes	WIN
<i>Tennessee v. Dunlap</i> , 426 U.S. 312 (1976)	Is a provision that causes separation from a civilian military position if there is separation from a military position valid?	Yes	WIN
<i>Alexander v. Fioto</i> , 430 U.S. 634 (1977)	Is a provision that those members of the Reserve and National Guard who were members before the termination of World War II are not eligible for retirement pay valid?	Yes	WIN
<i>Alabama Power Co. v. Davis</i> , 431 U.S. 581 (1977)	Must a civilian employer give credit for time spent in the service when his pension is calculated?	Yes	WIN
<i>Stencel Aero Engineering Corp. v. United States</i> , 431 U.S. 666 (1977)	Must the government indemnify third party suppliers for lawsuits filed over malfunctioning military aircraft?	No	WIN
<i>Brown v. Glines</i> , 444 U.S. 348 (1980)	Can the Air Force require servicemembers to secure permission to circulate petitions?	Yes	WIN
<i>Secretary of the Navy v. Huff</i> , 444	Can the Navy and Marine Corps require servicemembers to	Yes	WIN

U.S. 453 (1980)	secure permission to circulate petitions?		
<i>Coffy v. Republic Steel Corp.</i> , 447 U.S. 191 (1980)	Did employer's denial of benefits to returning employee under SUB plan violate VEVRA?	Yes	WIN
<i>Monroe v. Standard Oil Co.</i> , 452 U.S. 549 (1981)	Is an employer required to provide preferential scheduling of work hours for an employee who was absent from work to fulfill his military reserve obligations?	No	LOSS
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	Does requiring only males to register for the draft violate the Fifth Amendment's Equal Protection Clause?	No	WIN
<i>McCarty v. McCarty</i> , 453 U.S. 210 (1981)	Does the federal scheme of military retirement benefits pre-empted state community property laws?	No	WIN
<i>Ridgway v. Ridgway</i> , 454 U.S. 46 (1981)	Does a separation order ordering a constructive trust for life insurance infringe upon military life insurance policies, which, per federal law can not be subject to the claims of creditors?	Yes	WIN
<i>Weinberger v. Catholic Action of Hawaii / Peace Education Project</i> , 454 U.S. 139 (1981)	Must the Navy prepare and release a statement on storage of nuclear weapons, pursuant to the National Environmental Policy Act?	No	WIN
<i>Army &amp; Air Force Exchange Service v. Sheehan</i> , 456 U.S. 728 (1982)	Did an AAFES employee have a contract based under the Tucker Act, solely on the existence of the employer's personnel regulations?	No	WIN
<i>Chappell v. Wallace</i> , 462 U.S. 296 (1983)	Can enlisted servicemembers maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service?	No	WIN
<i>United States v.</i>	Are confidential statements	Yes	WIN

<i>Weber Aircraft Corp.</i> , 465 U.S. 792 (1984)	obtained during an Air Force crash probe protected by disclosure by Exemption 5 of the Freedom of Information Act (FOIA)?		
<i>Selective Service System v. Minnesota Public Interest Research Group</i> , 468 U.S. 841 (1984)	Can federal student aid be denied to students who refuse to register for the draft?	Yes	WIN
<i>United States v. Albertini</i> , 472 U.S. 675 (1985)	Can a “bar letter” be enforced after nine years as against a visitor to a military open house during a protest.	Yes	WIN
<i>United States v. Shearer</i> , 473 U.S. 52(1985)	Can service personnel sue the government from failing to protect them from being assaulted by fellow service personnel?	No	WIN
<i>Cornelius v. NAACP Legal Defense and Education Fund</i> , 472 U.S. 788 (1985)	Is the exclusion of Respondent’s charity during Department of Defense fundraising season permissible?	Yes	WIN
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986)	Does the Free Exercise Clause bar the Air Force from refusing to allow an officer to wear a yarmulke while indoors?	No	WIN
<i>United States v. Johnson</i> , 481 U.S. 681 (1987)	Can servicemembers sue for damages incurred incident to service because of the negligence of civilian employees?	No	WIN
<i>Rose v. Rose</i> , 481 U.S. 619 (1987)	Does a state court have jurisdiction to hold a disabled veteran in contempt for failing to pay child support, where the veteran's only means of satisfying his obligation was to utilize benefits received from the Veterans' Administration?	Yes	LOSS
<i>United States v. Stanley</i> , 483 U.S. 669 (1987)	Are tort actions available to servicemembers suing over being exposed to LSD experimentation incident to military service?	No	WIN
<i>Solorio v. United</i>	Can the military initiate a court-	Yes	WIN

<i>States</i> , 483 U.S. 435 (1987)	martial even if the offenses charged are not military in nature?		
<i>Department of the Navy v. Egan</i> , 484 U.S. 518 (1988)	Can a civilian review board review the merits of a denial of a security clearance cited as basis for firing a federal employee?	No	WIN
<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988)	Is the Veteran's Administration (VA) permitted to reject claims due to alcoholism unrelated to a psychiatric diagnosis that the VA recognizes?	Yes	WIN
<i>Boyle v. United Techs. Corp.</i> , 487 U.S. 500 (1988)	Can military contractors be immune from tort suits even absent an explicit statutory grant of immunity?	Yes	WIN
<i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988)	Is JAGMAN report of plane crash showing that pilot error was most probable admissible in court?	Yes	WIN
<i>Mansell v. Mansell</i> (490 U.S. 581 (1989)	Is military retirement pay waived by service member in order to receive disability benefits divisible marital property under the Uniformed Services Former Spouses' Protection Act?	No	WIN
<i>North Dakota, et al. v. United States</i> , 495 U.S. 423 (1990)	Are North Dakota liquor reporting and labeling requirements invalid, as applied to liquor destined for two military bases?	No	LOSS
<i>Fort Stewart Schools v. Federal Labor Relations Authority</i> , 495 U.S. 641 (1990)	Are schools that were owned by the Army required to bargain with union over wage and fringe benefits	Yes	LOSS
<i>Perpich v. Department of Defense</i> , 486 U.S. 334 (1990)	Must a state governor consent to federal training of state National Guard troops outside the United States?	No	WIN
<i>United States v. Smith</i> , 499 U.S. 160 (1991)	Is government employee immunized from an employment-related tort action for injuries the employee caused in a foreign country?	Yes	WIN
<i>King v. St. Vincent's Hosp.</i> , 502 U.S. 215	Is the reservist's request for a three-year leave of absence from	No	WIN

(1991)	his job at the hospital in order to complete a tour of duty with the Army unreasonable?		
<i>Molzof v. United States</i> , 502 U.S. 301 (1992)	Is the surviving spouse eligible for damages for medical expenses and for loss of enjoyment of life from medical negligence on the part of the VA Hospital?	Yes	LOSS
<i>Conroy v. Ansikoff</i> , 507 U.S. 511 (1993)	Is a member of the armed services required to show that his military service prejudiced his ability to redeem title to property before he could qualify for the statutory suspension of time?	No	WIN
<i>Church of Lukumi Babali Aye v. City of Hialeah</i> , 508 U.S. 520 (1993)	Were actions taken by a City to enjoin specific religious activity by a church in violation of the First Amendment?	Yes	WIN
<i>Harper v. Virginia Department of Taxation</i> , 509 U.S. 86 (1993)	Did Virginia violate the doctrine of intergovernmental tax immunity when it taxed federal retirement benefits but exempted state retirement benefits, retroactively to their retirement benefits?	Yes	WIN
<i>Weiss v. United States</i> , 510 U.S. 163 (1994)	Does the Appointments Clause bar JAG from assigning military officers to be judges at courts-martial and at the initial appellate level?	No	WIN
<i>Davis v. United States</i> , 512 U.S. 452 (1994)	Do <i>Miranda</i> rights attach to an ambiguous statement regarding counsel at Navy custodial interrogation?	No	LOSS
<i>Ryder v. United States</i> , 515 U.S. 177 (1995)	Does the <i>de facto</i> officer doctrine apply to civilian judges on military courts if the constitutionality of the appointment is at issue?	No	LOSS
<i>Edmond v. United States</i> , 520 U.S. 651 (1997)	Does the Appointments Clause bar the Secretary of Transportation from appointing civilian judges to the Coast Guard Court?	No	WIN

<i>Rumsfeld v. Padilla</i> , 542 U.S. 426 (2004)	Is the Secretary of Defense the legal custodian of a designated “enemy combatant”?	Yes	WIN
<i>Rasul v. Bush</i> , 542 U.S. 466 (2004)	Do civilian courts have jurisdiction to hear challenges to the detention of suspected terrorists at Guantanamo Bay, Cuba?	No	LOSS
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	Can the government indefinitely hold a designated “enemy combatant” without providing an opportunity to challenge?	No	LOSS
<i>Tenet v. Doe</i> , 544 U.S. 1 (2005)	Does public policy forbid an asserted spy from suing the United States to enforce its obligations under a purported secret espionage agreement.	Yes	WIN
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	Are state prisoners entitled to exercise nonmainstream religious practices?	Yes	WIN
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U.S. 47 (2006)	Does the Solomon Amendment, 10 U.S.C.S. § 983, which tied federal funding for institutions of higher education with giving military recruiters access equal to that provided to other recruiters, infringe on First Amendment freedoms of speech and association?	No	WIN
<i>Georgia v. Randolph</i> , 547 U.S. 103 (2006)	Does a warrantless search to which the Defendant explicitly did not consent, but to which his wife did consent a lawful consent?	No	LOSS
<i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007)	Did petitioner Bureau of Land Management officials engage in harassment and intimidation, aimed at extracting an easement, for Respondent filing Fifth Amendment retaliation claim under Bivens and a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Hobbs Act.	Yes	WIN
<i>Baze v. Rees</i> , 553 U.S. 35 (2008)	Was Kentucky’s lethal injection protocol unconstitutional under	No	WIN

	the Eighth Amendment's ban on cruel and unusual punishments, because of the risk that the protocol's terms might not be properly followed?		
<i>Munaf v. Geren</i> , 553 U.S. 674 (2008)	Does the habeas statute extend to American citizens held overseas by American forces operating subject to an American chain of command?	Yes	WIN
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	Does the District of Columbia's ban on handgun possession violate the Second Amendment?	Yes	WIN
<i>Kennedy v. Louisiana</i> , 554 U.S. 570 (2008)	Does the existence of a military death penalty for the rape of a child mean that the State of Louisiana can have the same punishment on its books?	No	WIN
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009)	Were errors, in two separate cases, by the Department of Veteran's Affairs harmless?	No	LOSS
<i>United States v. Denedo</i> , 556 U.S. 904 (2009)	Is an alien's petition for a writ of <i>coram nobis</i> in the NMCCA, which asked the NMCCA to vacate his conviction because he received ineffective assistance of counsel, valid?	Yes	WIN
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	Is a ban on corporate independent expenditures for electioneering communications under 2 U.S.C.S. §441b and disclaimer and disclosure requirements under 2 U.S.C.S. §§434 and 441 valid?	No	LOSS
<i>Free Enterprise Fund, et al. v. Public Company Accounting Oversight Board</i> , 561 U.S. 477 (2010)	Does the dual for-cause limitations on the removal of Board members in the Sarbanes-Oxley Act contravene the Constitution's separation of powers?	Yes	WIN
<i>Henderson v. Shinseki</i> , 562 U.S. 428 (2011)	Does failing to meet the deadline for filing a notice of appeal with the Veterans Court have jurisdictional consequences?	No	WIN
<i>Milner v. Department of the</i>	Can the Navy claim a FOIA exemption for base plans,	No	LOSS

<i>Navy</i> , 562 U.S. 428 (2011)	claiming that the release of those plans would threaten the base and community?		
<i>Staub v. Proctor Hospital</i> , 562 U.S. 411 (2011)	Is a termination of an employee by a neutral Human Resources official, which is based on hostile actions taken by subordinates against that employee for his military obligations permissible?	No	WIN
<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012)	Is the Stolen Valor Act, which makes it a crime to falsely claim receipt of military decorations, unconstitutional as an impermissible infringement on the First Amendment ?	Yes	LOSS
<i>Levin v. United States</i> , 133 S. Ct. 1224 (2013)	Does the Gonzalez Act abrogate the FTCA's intentional tort exception?	Yes	LOSS
<i>United States v. Kebodeaux</i> , 133 S. Ct. 2496 (2013)	Does the Necessary and Proper Clause grants Congress the power to enact the Sex Offender Registration and Notification Act's (SORNA) registration requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA's enactment?	Yes	WIN
<i>United States v. Apel</i> , 134 S. Ct. 1144 (2014)	Is the public road and easement outside of the fenced military installation under military control for purposes of trespassing?	Yes	WIN

\*Military win or loss describes success of a military position. If the case does not directly impact the military, then "win" or "loss" describes favorable or non-favorable treatment by the Court.



## APPENDIX C

### CASE LIST

*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

*Brandenberg v. Ohio*, 395 U.S. 444 (1969).

*Brown v. Glines*, 444 U.S. 348 (1990).

*Bunting v. Mellen*, 541 U.S. 1019 (2004).

*Bush v. Gore*, 531 U.S. 98 (2000).

*Chappell v. Wallace*, 462 U.S. 296 (1983).

*Cohen v. California*, 403 U.S. 15 (1971).

*Craig v. Boren*, 429 U.S. 190 (1976).

*Citizens United v. Fec*, 558 U.S. 310 (2010).

*Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2003).

*Dynes v. Hoover*, 61 20 Howard 65 (1858).

*Feres v. United States*, 340 U.S. 135 (1950).

*Ex Parte Mason*, 105 U.S. 696 (1881).

*Frontiero v. Richardson*, 411 U.S. 677 (1973)

*Georgia v. Randolph*, 547 U.S. 103 (2006).

*Goldman v. Weinberger*, 475 U.S. 503 (1986).

*Grafton v. United States* 206 U.S. 333 (1907).

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

*Hein v. Freedom from Religion Foundation*, 552 U.S. 587 (2007).

*Johnson v. Robison*, 415 U.S. 361 (1974).

*Korematsu v. United States*, 323 U.S. 214 (1944).

*Levin v. United States*, 133 S. Ct. 1224 (2013).

*Lawrence v. Texas*, 539 U.S. 558 (2003).

*Mansell v. Mansell*, 490 U.S. 581 (1989).

*McCarty v. McCarty*, 453 U.S. 210 (1981).

*Middendorf v. Henry*, 425 U.S. 25 (1976).

*Moseley v. Secret Catalogue*, 537 U.S. 418 (2003).

*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

*McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005).

*National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012).

*North Dakota, et al. v. United States*, 495 U.S. 423 (1990).

*Parker v. Levy*, 417 U.S. 733 (1974).

*Pearson v. Callahan*, 555 U.S. 223 (2009).

*Rasul v. Bush*, 542 U.S. 466 (2004).

*Reid v. Covert*, 354 U.S. 1 (1957).

*Ridgway v. Ridgway*, 454 U.S. 46 (1981).

*Rostker v. Goldberg*, 453 U.S. 57 (1981).

*Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

*Ryder v. United States*, 515 U.S. 177 (1995).

*Saucier v. Katz*, 533 U.S. 194 (2001).

*Schlesinger v. Ballard*, 419 U.S. 498 (1975).

*Schlesinger v. Councilman*, 420 U.S. 738 (1975).

*Secretary of the Navy v. Huff*, 444 U.S. 453 (1980).

*Shinseki v. Sanders*, 556 U.S. 396 (2009).

*Staub v. Proctor Hospital*, 562 U.S. 411 (2011).

*Texas v. Johnson*, 491 U.S. 397 (1989).

*United States v. Albertini*, 472 U.S. 675 (1985).

*United States v. Alvarez*, 132 S.Ct. 2537 (2012).

*United States v. Denedo*, 556 U.S. 904 (2009).

*United States v. Franz*, 2 U.S.C.M.A. 48 (1953).

*United States v. Johnson*, 481 U.S. 681 (1987).

*United States v. Keenan*, 18 U.S.C.M.A. 108 (1969).

*United States v. Marsh*, 3 U.S.C.M.A. 48 (1953).

*United States v. Schultz*, 18 U.S.C.M.A. 133 (1969).

*United States v. Shearer*, 473 U.S. 52 (1985).

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*Westfall v. Erwin*, 484 U.S. 292 (1988).

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- Art. 15. Commanding Officer's Non-Judicial Punishment.* 1956.
- Art. 2. Persons Subject to this Chapter.* 1956.
- Art. 86. Absence Without Leave.* 1956.
- Art. 88. Contempt Toward Officials.* 1956.
- Art. 89. Disrespect Toward Superior Commissioned Officer.* 1956.
- Art. 90. Assaulting or Willfully Disobeying Superior Commissioned Officer.* 1956.
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